No. 122081

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- ARTHUR MANNING Defendant-Appellee	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-14-0930. There on appeal from the Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois, No. 08 CF 2729. Honorable Susan Clancy Boles, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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STATEMENT OF FACTS

The Statement of Facts in the State's opening brief is generally accurate and sufficient to resolve the issues presented. Any additions or corrections will be noted in the relevant portions of the Argument section, below.

ARGUMENT

THE TRIAL JUDGE REVERSIBLY ERRED WHERE SHE: (A) FAILED TO GIVE A DIRECT "NO" ANSWER WHEN THE JURY ASKED IF NON-UNANIMITY REGARDING THE MITIGATING FACTORS MEANT THAT THE VERDICT WOULD "REVERT" FROM SECOND DEGREE MURDER TO FIRST DEGREE MURDER; AND (B) REFUSED TO POLL THE JURY SPECIFICALLY TO DETERMINE IF ANY JUROR BELIEVED THAT A MITIGATING FACTOR EXISTED.

A. Summary of Argument

During its deliberations, the jury in this case asked a direct and potentially decisive question: if it could not unanimously agree whether or not the defendant met his burden to prove the existence of a mitigating factor to warrant a verdict finding him guilty of second degree murder, would the verdict "revert" to first degree murder? (C. 590; R. 1586) The jury's direct question called for a direct answer. However, the trial judge essentially evaded the question. Instead of giving a straight "yes" or "no" answer, the judge merely told the jurors that their verdict "must be unanimous," something they had already been told whey they received their instructions. (C. 555-57; R. 1580,1589-90) Simply put, the judge did not answer the question the jury had asked: whether there could be a "unanimous" guilty verdict on first degree murder if the jurors were *not* "unanimous" regarding the existence of a mitigating factor that would warrant a guilty verdict on second degree murder.

Contrary to the State's argument, (St. Br. at 9-19) the judge should have answered the jury's question with a flat "no." As the appellate court succinctly explained, although a jury must unanimously find that the State

had proved the elements of first degree murder before it could consider if the defendant proved the existence of a mitigating factor, "a juror who goes on to vote to find the presence of a mitigating factor is voting to convict the defendant of second degree murder. Thus, if some jurors vote to find the presence of a mitigating factor, and if other jurors vote otherwise, the jury is not *unanimous* on the defendant's guilt of first degree murder." *People v. Manning*, 2017 IL App (2d) 140930, ¶15 (emphasis added). In short, a guilty verdict on first degree murder cannot be described as "unanimous" when some jurors believed the defendant was guilty of only second degree murder. To hold otherwise would offend both logic and plain English.

The judge's failure to answer the jury's question correctly would not have mattered if she had later taken advantage of an opportunity to make sure that no juror believed that the defendant had proved the existence of a mitigating factor. After the jury returned its verdict finding the defendant guilty of first degree murder, defense counsel asked the judge to poll the jurors to determine if any juror found that the defendant proved the existence of a mitigating factor. Polling the jurors on that specific question would have cured the prejudice arising from the judge's failure to directly answer to the jury's question, but she rejected the defense request. (R. 1588, 1591-92)

Because the trial judge failed to ensure that the verdict finding the defendant guilty of first degree murder was unanimous, that verdict cannot be trusted. This Court must reverse his conviction and remand the case for a new trial.

B. Trial Judge's Duty to Answer the Jury Question

The "general rule" in Illinois is that a judge "has a duty" to provide an answer when the jury "pose[s] an explicit question or request[s] clarification on a point of law arising from facts about which there is doubt or confusion." *People v. Childs*, 159 Ill. 2d 217, 228-29 (1994). The judge must discharge this duty even if the jury has already received proper instructions. *Childs*, 159 Ill. 2d at 229. What matters is not whether the original instructions are accurate, but whether the jury can discern their meaning and find them adequate to its task. *Childs*, 159 Ill. 2d at 231. As *Childs* put it, "[J]urors are entitled to have their inquiries answered," at least when those inquiries concern matters of law. 159 Ill. 2d at 228-29. To put it bluntly, when the jurors seek, the judge must help them find.

Crucially, a trial judge commits "prejudicial error" not only when she completely fails to respond to a jury inquiry raising a point of law, but also when she gives "a response which provides no answer to the particular question of law" the jury has raised. *Childs*, 159 Ill. 2d at 229. A jury that is "explicit" about its "difficulties" deserves to have the judge resolve those difficulties "with specificity and accuracy." *Childs*, 159 Ill. 2d at 229.

The State twice claims that the judge's response to the jury question "was not error." (St. Br. at 22, 23) But the State never disputes the rule set forth in *Childs*. In fact, the State never even mentions *Childs,* despite numerous citations to *Childs* in the defendant's appellate court brief. (St. Br. at i-iii) (Def. App. Ct. Br. at 24, 27, 31, 34-37). More importantly,

the State never explains how the judge's response – merely telling the jurors that their verdict had to be unanimous and asking them to keep deliberating (C. 590; R. 1589-90) – provided a meaningful answer to the jury's question, which is what *Childs* requires.

In particular, the State does not rely on *People v. Raue*, 236 Ill. App. 3d 948 (3rd Dist. 1992). Like the defendant here, the defendant in *Raue* was charged with first degree murder and proceeded to a jury trial, at which the jury was also instructed on second degree murder. 236 Ill. App. 3d at 949. During its deliberations, the jury in *Raue* asked the trial judge virtually the same question the jury asked here. With the agreement of both parties, the trial judge in *Raue* told the jury: (1) the defendant had the burden to prove the existence of a mitigating factor by a preponderance of the evidence; (2) if the defendant did not meet that burden, the proper verdict would be first degree murder; (3) however, if the defendant met that burden, the proper verdict would be second degree murder; and (4) any verdict had to be unanimous. 236 Ill. App. 3d at 951-52.

After finding that the defendant had "waived" any challenge to the trial judge's response, the appellate court held that the response did not amount to plain error. *Raue*, 236 Ill. App. 3d at 951-52. The appellate court concluded that the judge had properly exercised his discretion when he concluded that the jury had already received sufficiently clear instructions and that a flat "yes" or "no" response might have effectively directed a verdict. *Raue*, 236 Ill. App. 3d at 952. Although the appellate court here

was aware of *Raue*, the court chose not to follow it. While not expressing any opinion about the "merits" of the response given by the trial judge in *Raue*, the appellate court here noted that the judge's "mere rephrasing" of the jury instructions "*might* have been sufficient to alleviate the jury's confusion" in that case. *Manning*, 2017 IL App (2d) 140930, ¶25 (emphasis added). According to the appellate court, however, the trial judge's response was "very unlikely" to have resolved the jury's confusion in this case. *Manning*, 2017 IL App (2d) 140930, ¶25.

Apart from the distinction noted by the appellate court, *Raue* can be reconciled with the decision here because the defendant in *Raue* did not simply forfeit his right to complain about any error in the judge's response in that case, but actively *invited* the error. Defense counsel in *Raue* explicitly "agreed" that the judge's response was "satisfactory." 236 Ill. App. 3d at 951-52. Having invited the alleged error, the defendant in *Raue* could not even argue that it amounted to plain error. *E.g., People v. Villareal*, 198 Ill. 2d 209, 227-28 (2001) (invited error "goes beyond mere waiver" and precludes plain error review).

Although the appellate court here found that the trial judge should have answered the jury question with a flat "no," the court also found that the defendant invited the judge's alternative response and thus declined to grant relief because of that error. *Manning*, 2017 IL App (2d) 140930, ¶¶15-19. The State disagrees with the appellate court's first finding, but agrees with its finding of invited error. (St. Br. at 9-23) The defendant will address

the invited error issue in a separate subsection (see pp. 20-27, below), where he will explain why the invited-error doctrine should not apply here.

Regarding the propriety of the judge's response to the jury question, *Raue* at most shows a conflict between two appellate court districts. Even if this Court cannot reconcile *Raue* with the decision here, this Court should reject *Raue* and adopt the rule announced by the appellate court in this case.

The trial judge here utterly failed to discharge her duty under *Childs*. When the jurors asked a question raising a pivotal legal issue – what verdict should be returned if they were split about the existence of a mitigating factor – the trial judge did nothing to dispel their confusion. Her response avoided the key question: what counts as a "unanimous" verdict where a jury in first degree murder case is also instructed on second degree murder? The right to a unanimous verdict is fundamental, having both constitutional and statutory roots. Ill. Const. Art. I, §13; 725 ILCS 5/115-4(o) (2008); *People v. Gallano*, 354 Ill. App. 3d 941, 952-63 (1st Dist. 2004).

Although the jury received the proper pattern instructions, (R. 1568-82), none of those instructions answered the jury's question The jurors did not ask if they had to unanimously agree that the State had proved each element of first degree murder before considering the mitigating factors for second degree. Nor did they ask which party had the burden to prove a mitigating factor. What the jurors wanted (and needed) to know was what to do if they were deadlocked about whether the defendant had proved a mitigating factor.

The instructions given here conformed to the prescribed patterns, but were nonetheless ambiguous. They told the jury that its verdict had to be unanimous but failed to clarify what the law required if the jury was deadlocked about the existence of a mitigating factor. The instructions told the jury: (1) non-unanimity about the elements of first degree murder required a not guilty verdict; and (2) unanimity regarding the elements of first degree murder would require it to consider whether the offense should be mitigated to second degree murder. (R. 1578-80) But the instructions obviously left the jury in the dark concerning the legal consequences of non-unanimity on the issue of mitigation. Otherwise, the jury would not have asked the question it did.

The instructions allow for conflicting interpretations. They could be read to suggest that non-unanimity about a mitigating factor would allow the jury to convict the defendant of first degree murder. On the other hand, the instructions could be read to suggest that non-unanimity regarding a mitigating factor would bar the jury from returning any verdict at all, because a jury could hardly return a "unanimous" verdict if some jurors thought the defendant was guilty of first degree murder while others thought he was guilty only of second degree murder. Even if the instructions could somehow be read to avoid this ambiguity, the jury here was clearly confused on this point of law. Therefore, the jury deserved to a better response to its question. The jury deserved a response that actually answered the question it asked. *Childs*, 159 Ill. 2d at 228-29, 231. The importance of the unanimity

requirement heightened the judge's duty to dispel the jury's understandable confusion.

C. The Correct Answer to the Jury's Question Was "No"

The State spends most of it time arguing not that the trial judge correctly answered the jury question, but rather that the appellate court erred by finding that she should have answered the question in the negative. (St. Br. at 9-21) The State's effort is misguided, mainly because it derives from a flawed premise.

According to the State, the defendant's argument – and, by extension, the appellate court's finding – "turns the second degree murder statute on its head, effectively requiring the State to *disprove* mitigation to secure a first degree murder conviction." (St. Br. at 17, emphasis in original) "In other words," the State adds, "[the] defendant's argument makes the absence of mitigating circumstances a new element of first degree murder." (St. Br. at 17) The State misunderstands what the defendant is claiming and what the appellate court found.

Answering the jury's question with a "no" would have neither shifted the burden of proof regarding the existing of a mitigating factor nor changed the elements of first degree murder. A "no" answer merely would have advised the jury that a unanimous finding that the State had proved every element of first degree murder was not enough to convict the defendant of first degree murder. To find the defendant guilty of first degree murder, the jury would also have to unanimously find that the defendant failed to prove a

mitigating factor needed to reduce the offense to second degree. Simply put, a "no" answer would have done nothing more than clarify what it meant for a guilty verdict to be "unanimous" when the jury is given the choice between first degree murder and second degree murder.

The State's mistaken view regarding the implications of a "no" answer leads it to engage in a long but irrelevant discussion about the relationship between first degree murder and second degree murder. The State cites numerous authorities indicating: (1) a defendant cannot be convicted of second degree murder unless and until the trier of fact finds that the State has proved each element of first degree murder beyond a reasonable doubt; (2) only after making that finding may the trier of fact consider if the defendant has proved, by a preponderance of the evidence, the existence of a factor that legally mitigates the offense to second degree; (3) consequently, second degree murder is not a lesser included offense of first degree murder, but only a lesser mitigated offense. (St. Br. at 10-17)

The defendant has no quarrel with any of those propositions. Indeed, his brief in the appellate court explicitly accepted them. (Def. App. Ct. Br. at 28-30, 32) The defendant emphasized that he was "*not* arguing" that he was "wrongly required" to prove the existence of a mitigating factor, let alone that non-unanimity regarding a mitigating factor required the jury to find him guilty of second degree or to acquit him altogether. (Def. App. Ct. Br. at 26) As he explained, (Def. App. Ct. Br. at 26), and as the State interprets the appellate court's finding (St. Br. at 9), non-unanimity about the existence

of a mitigating factor merely barred the jury from returning any verdict at all. The State, then, has knocked down a row of straw-men, refuting arguments the defendant never made and/or expressly declined to make.

None of the authorities cited in the relevant portion of the State's brief answers the question presented here. The cases and secondary sources cited by the State are used only to support one or more of the undisputed propositions discussed above. (St. Br. at 9-19)[1] Those cases and sources shed no light on whether a jury that is split on the existence of mitigating factors can "unanimously" find a defendant guilty of first degree murder.

The most recent case cited by the State is *People v. Fort*, 2017 IL 118966. In *Fort*, a juvenile charged with first degree murder was tried as an adult under the "automatic transfer" provision of the Juvenile Court Act. Following a bench trial, he was found guilty of second degree murder and sentenced to 18 years in prison. 2017 IL 118966, ¶1. Based on its reading of the Juvenile Court Act, *Fort* vacated that prison sentence and remanded the cause for further sentencing proceedings. 2017 IL 118966, ¶¶24-34, 41-43. In reaching that result, the majority in *Fort* indicated that when a defendant proves the existence of a mitigating factor, the prosecution must then prove

[1] The cases cited by the State include *People v. Staake*, 2106 IL App (4th) 140638, ¶¶54, 67. This Court has granted leave to appeal in *Staake*. 80 N.E.3d 6 (2017) (Table). That appeal is pending as No. 121755. Based on the State's opening brief, which was filed in August of 2017, the issues before this Court in *Staake* appear to concern the exclusion of certain evidence and a possible violation of the defendant's right to a speedy trial. The outcome in *Staake* would thus have no bearing on the issue presented here.

"the absence of a mitigating factor." 2017 IL 118966, ¶33. According to the State, *Fort* should not be read as having implicitly overruled this Court's prior decisions, which held that the prosecution has no burden to disprove a mitigating factor. In the State's view, any comment by the majority in *Fort* indicating otherwise should be regarded as mere "dicta." (St. Br. at 17-18)

The defendant has no position on whether *Fort* was correctly decided, but freely concedes that the majority in *Fort* may have erred by suggesting that the State must disprove a mitigating factor. Even if that concession means that *Fort* was wrongly decided, it hardly defeats the defendant's argument in this case. The defendant's argument in no way requires a finding that the prosecution has any burden to disprove the existence of a mitigating factor. Moreover, because *Fort* involved a bench trial, that case obviously could not generate any question about whether a jury may return a unanimous verdict on either first degree murder or second degree murder when it is deadlocked about the existence of a mitigating factor.

The flaws in the State's argument are not limited to its mistaken insistence that a "no" answer to the jury's question in this case would have "turn[ed] the second degree murder statute on its head" by requiring the State to "*disprove* mitigation to the satisfaction of a unanimous jury." (St. Br. at 17, 19; emphasis in original) The State also wrongly asserts that "a defendant is guilty of first degree murder unless all twelve jurors find mitigation" and that "[a]nything short of unanimity on second degree murder fails to call the first degree murder verdict into doubt" (St. Br. at 10, 19)

The State's assertions are both illogical and presumptuous. They neither follow from the pertinent statutory language nor are supported by citations to relevant authority. Instead of making a reasoned argument, the State just assumes its desired conclusion.

The State's assertions also lack the sanction of common sense. Given the ordinary meaning of "unanimous," how can a verdict finding a defendant guilty of first degree murder be "unanimous" when some jurors believe the defendant should be found guilty of second degree? Granted, the applicable statute and pattern instructions show that a jury cannot find a defendant guilty of second degree murder without unanimously finding that the State proved each element of first degree, including the absence of lawful justification. 720 ILCS 5/9-2(c) (2008); Illinois Pattern Instruction-Criminal, 4th ed., No. 7.06B. But that proposition – "A unanimous finding that the State has proved the elements of first degree murder is a prerequisite for a jury to consider second degree murder" – does not entail the proposition that the State wants this Court to adopt, namely, "A guilty verdict on first degree murder is the default result if there is non-unanimity regarding the existence of a mitigating factor."

Similarly, the State illogically argues that "because the defendant bears the burden of proving mitigation only after the State has proved the defendant guilty of first degree murder, the defendant's failure to carry that burden results in a verdict of guilty of first degree murder." (St. Br. at 13-14) Again, the State's conclusion (the defendant is guilty of first degree murder

if any juror finds that he failed to prove a mitigating factor) does not follow from its premise (the defendant has the burden to prove a mitigating factor). The defendant does not question the State's premise, only its conclusion. He does so because that premise is equally compatible with a different conclusion: non-unanimity regarding the existence of a mitigating factor results in a hung jury.

The jury's question called for a direct "yes" or "no" answer, but the State conspicuously never explicitly argues in favor of the "yes" option. (St. Br. at 9-24) In his appellate court brief, the defendant explained that the answer could not have been an unqualified "yes" because that answer would have essentially directed a guilty verdict on first degree murder. An unqualified "yes" answer would have made a unanimous finding that the State had proved first degree murder a *sufficient* condition as well as a *necessary* condition for finding him guilty of that offense. (Def. App. Ct. Br. at 32) At best, unanimity about the elements of first degree murder *permits* a guilty verdict on that offense. It cannot *compel* such a verdict, since any juror who believed that the defendant had proved a mitigating factor could justifiably refuse to sign a verdict finding him guilty of first degree. (Def. App. Ct. Br. at 32)

The defendant went on to explain why even a qualified "yes" response would have ben improper, *i.e.*, why the judge could not have told the jury, "Yes, if you are split about the existence of a mitigating factor, you may find the defendant guilty of first degree murder, but you are not required to

return such a verdict." (Def. App. Ct. Br. at 32-33) Such a "yes, but" response would have been improper for two reasons. First, under the "rule of lenity," any ambiguity in a penal statute must be "strictly construed" in favor of the accused. *In re Detention of Powell*, 217 Ill. 2d 123, 142 (2005). Here, the second degree murder statute is ambiguous because it fails to specify what the jury should do if it agrees that the State proved first degree murder but is split about whether the defendant proved a mitigating factor. 720 ILCS 5/9-2(c) (2008). Construing the statute to permit a verdict finding the defendant guilty of first degree murder in that situation would violate the rule of lenity. Under that rule, the statute should be construed so that non-unanimity about the existence of a mitigating factor bars a jury from returning any verdict, as the jury could then unanimously say only that the defendant was guilty of either first degree murder *or* second degree murder.

More importantly, only a flat "no" answer to the jury's question would have protected the defendant's basic right to a unanimous verdict. The point bears repeating: when jurors disagree about the existence of a mitigating factor, a verdict finding the defendant guilty of first degree murder instead of second degree murder would literally be less than "unanimous."

D. The Rule Adopted By the Appellate Court Will Neither Cause Undue Hardship Nor Produce Absurd Results

To persuade this Court that a jury should not be told that a split regarding the existence of a mitigating factor prohibits a guilty verdict on first degree murder, the State ultimately resorts to certain policy concerns.

Specifically, the State argues that prohibiting first degree murder guilty verdicts in that situation will: (1) make it "very difficult" for the State to win first degree murder convictions; and (2) often result in "hung juries" and "costly retrials;" (3) require judges to provide non-pattern jury instructions; and (4) require judges to provide either "special verdict forms" or to conduct "specific jury polling" in every murder trial. (St. Br. at 19-20) None of the State's policy concerns has any merit.

Perhaps it will be harder for the State to win first degree murder convictions in jury trials if such convictions require unanimity about the absence of mitigating factors when second degree is an option. But the State's complaint about that possible increased difficulty stems from two false assumptions. First, the State assumes that the legislature *intended* to make it easier for it to win convictions for first degree murder by allowing such convictions even when jurors are deadlocked about a mitigating factor, which is hardly clear from the second degree murder statute. Second, the State assumes that the judiciary is obliged to read the second degree murder statute to make it *easier* for the State to win first degree murder convictions. That assumption not only violates the "rule of lenity," but also wrongly suggests that the judiciary should function as a handmaiden for the executive rather than as an independent and impartial arbiter between the executive and those whom it seeks to prosecute.

Additionally, the State's complaint threatens to carry this Court down a slippery slope, as it could make the same complaint in almost any criminal

case. For example, the State could complain that this Court has made it harder to convict defendants of armed robbery with a dangerous weapon when it held that the legislature intended to use an objective test to determine what counts as a "dangerous weapon" and held that a "harmless" toy gun failed that test. *People v. Skelton*, 83 Ill. 2d 58, 62-66 (1980); *see also, People v. Ross*, 229 Ill. 2d 255, 274-77 (2008) (confirming that *Skelton* found that the legislature chose not to use a "subjective test" to determine what counts as a "dangerous weapon" and holding that an unloaded or inoperable gun qualifies as a "dangerous weapon" only if the State shows that it was either used as a club/bludgeon or was capable of being used in that manner).

The State's other complaints – regarding frequent "hung juries" and "costly retrials," as well as the need for non-pattern jury instructions, "special verdict forms," or "specific jury polling" in murder cases – are speculative and exaggerated scare tactics. Such tactics show more concern for judicial economy than for the defendant's right to a unanimous verdict. The State offers no reason why administrative issues should override a basic and venerable tenet of our criminal justice system.

The State also never explains why it would be onerous for judges to use non-pattern jury instructions and to either submit "special verdict forms" or conduct "specific jury polling" until new pattern instructions and verdict forms are approved. Trial judges and attorneys have had to make similar adjustments in the past. To cite just one example, the home invasion statute was amended in 2000 to create versions of the offense carrying enhanced

sentences if the defendant possessed or personally fired a gun during the offense, but it took until 2015 to make the necessary changes in the applicable pattern issues instruction. 1999 Legis. Service P.A. 91-404 (amending home invasion statute to provide for enhanced sentences based on possession or personal discharge of a gun); Illinois Pattern Instruction-Criminal (4th ed. 2000) 11.54, Committee Note (modified issues instruction was approved in May, 2015). A trial court must use a pattern instruction "*unless the court determines that it does not accurately state the law*." Supreme Court Rule 451(a) (emphasis added). Therefore, between 2000 and 2015, a non-pattern issues instruction was required whenever a defendant was charged with home invasion based on his possession or personal discharge of a firearm.

A non-pattern instruction is proper when it is "an accurate, simple, brief, impartial, and non-argumentative statement of the law." *People v. Pollock*, 202 Ill. 2d 189, 211 (2002). There is no reason why a non-pattern instruction satisfying those criteria could not be drafted to inform a jury that non-unanimity regarding a mitigating factor bars it from finding the defendant guilty of any form of murder. Indeed, if this Court were to agree with the appellate court on this question, its opinion could easily provide judges and attorneys with the language they would need to draft such an instruction. Giving juries that instruction would obviate the State's concern about "specific jury polling." (St. Br. at 19)

Nor does the State explain exactly how it knows that "hung juries"

and "costly retrials" would occur in "large numbers." (St. Br. at 19) The State can reach that conclusion only by assuming that "large numbers" of juries who are given the option of convicting a defendant of second degree murder instead of first degree murder will be unable to reach unanimity regarding the existence of a mitigating factor. How often that will happen, however, is an empirical question that can only be answered by future experience. Precedent offers little guidance. The decision in *Raue*, discussed earlier at page 5, appears to be the only reported Illinois murder case where a jury indicated it was deadlocked about the existence of a mitigating factor. 236 Ill. App. 3d at 951-52.

To increase the weight of these policy concerns, the State puts its thumb on the scale by cherry-picking one example from the range of possible fact patterns. The State warns that the appellate court's "new rule" will cause mistrials instead of first degree murder convictions "because even *a single juror*'s belief that a mitigating factor was proved by a preponderance of the evidence would result in *no verdict whatsoever*." (St. Br. at 20; first emphasis added, second emphasis in original) The "new rule," however, could just as easily disadvantage defendants. Under that rule, a defendant will face the possibility of a retrial on the first degree murder charge instead of being found guilty of second degree murder even if only a "single juror" found that the defendant *failed* to prove the existence of a mitigating factor.

Fairness requires this Court to consider the "worst case scenario" for each side: the split regarding the existence of a mitigating factor could range

anywhere from 11:1 in the State's favor to 11:1 in the defendant's favor. According to the State, the result in the first scenario would be "absurd." (St. Br. at 20) But from the defendant's perspective, the result in the second scenario would be equally "absurd." In truth, neither result is "absurd." Rather, such results represent the price of requiring unanimous verdicts, and that price must be paid whenever a jury is divided, whether a defendant is on trial for murder or for a Class C misdemeanor. Sometimes the State pays that price, and sometimes the defendant pays it. The only way to avoid that price is to dispense with the unanimity requirement, which would cost more than what the citizens of Illinois – who have embedded the requirement into their Constitution – are willing to pay. Ill. Const. Art. I, §13; *People v. Gallano*, 354 Ill. App. 3d 941, 952-63 (1st Dist. 2004).

E. The Error Arising From The Judge's Response to the Jury Question Was Neither Invited, Forfeited, Nor Harmless

In its last argument section dealing with the trial judge's response to the jury question. the State asserts that even if the response was erroneous, any error was "harmless, invited, and forfeited." (St. Br. at 21) The State is wrong on all three counts.

The State begins by discussing harmless error (St. Br. at 21), but the defendant will first address the question of invited error. Starting with invited error makes sense because defendant who invites an error cannot challenge it on appeal, even as plain error. *E.g., People v. Villareal*, 198 Ill. 2d 209, 227-28 (2001). (St. Br. at 22) The plain error doctrine permits review

of an error that is *forfeited*, not an error that is *invited*. Indeed, a defendant who invites an error may be said to have "forfeited" his right to plain error review. *People v. Harding,* 2012 IL App (2d) 101011, ¶17. Therefore, if the defendant invited the trial judge's erroneous response here, whether he forfeited his right to challenge it on review becomes a moot point.

By arguing invited error, the State essentially asks this Court to accept the appellate court's conclusion. Although the appellate court agreed that the trial judge should have answered the jury question here with a flat "no,"the court found that the invited error doctrine barred the defendant from obtaining relief based on that claim. *Manning*, 2017 IL App (2d) 140930, ¶¶15-19. According to the court, the defense invited any error given trial counsel's "acquiescence" when the judge said that she would simply tell the jury that its verdict must be unanimous. 2017 IL App (2d) 140930, ¶16. The defendant submits that the appellate court's finding of invited error reflects its failure to apprehend the structure of the defendant's argument.

The defendant's appellate court brief made a single argument, as indicated by the Argument heading, which is repeated almost verbatim here. (Def. App. Ct. Br. at 24) The argument's conclusion was that the defendant is entitled to a new trial. What the State and the appellate court have treated as distinct claims for relief were instead premises leading to that conclusion. The defendant's argument amounts to this: (1) the trial judge should have answered the jury question with a flat "no;" (2) because she failed to give that answer, the judge should have polled the jury as the defense requested

to ensure that the verdict was unanimous; and (3) by not answering the jury's question correctly and then refusing to poll the jury as counsel requested, the judge failed to protect the defendant's right to a unanimous verdict

The defendant's argument consists of multiple parts that form a unity. On the one hand, if the judge had properly answered the jury question, there would have been no need for her to poll the jury as defense counsel requested. On the other hand, if she had polled the jury as counsel requested, her failure to answer the question properly would not matter. Simply put, the judge's failure to properly answer the question was prejudicial because she failed to poll the jury as counsel requested, while her failure to poll the jury as counsel requested was prejudicial because she did not properly answer the question. Thus, the "jury question" problem and the "jury polling" problem are just different facets of a common issue.

Insofar as the appellate court's invited error finding rests on its artificial division of the defendant's argument, that finding cannot stand. In the appellate court, the State admitted that the defendant "[a]rguably" relied on "the jury question issue" to support his claim that the trial judge erred by refusing to poll the jury as the defense requested. (St. App. Ct. Br. at 19) In this Court, the State never argues that the judge's failure to poll the jury as the defense requested is immune from review under the invited error doctrine. (St. Br. at 23-24) Given the interlocking relationship between the judge's omissions, her failure to answer the jury's question properly likewise should not be sheltered by the invited error doctrine.

Even if the judge's failure to answer the jury question properly and her failure to poll the jury as the defense requested raise distinct issues, the appellate court's invited error finding regarding the jury question issue should be rejected. That finding relies on an overly narrow reading of the record.

After the judge proposed telling the jury only that its verdict must be unanimous, defense counsel commented, "I believe that's correct, Judge." (R. 1588) The appellate court mistakenly seized on that isolated remark to find that counsel acquiesced to the response and thereby invited any error. 2017 IL App (2d) 140930, ¶¶16-17. The appellate court ignored what occurred both before and after counsel made that remark.

When the judge initially asked the parties how to answer the jury question, defense counsel unambiguously asked her to answer it with a "no." (R. 1586) Although the prosecutor first asked for a "yes" answer, he almost immediately expressed uncertainty and asked for time to research the issue. (R. 1586, 1588) Specifically, he said he "might be wrong" in thinking that a split about the existence of a mitigating factor resulted in a unanimous guilty verdict on first degree murder instead of a "hung jury." (R. 1588) At that point, the judge proposed telling the jury, "Your verdict must be unanimous. Keep deliberating." (R. 1588) The prosecutor said he had "no problem" with that response and – as noted above – defense counsel said, "I believe that's correct, Judge." (R. 1588) However, the prosecutor again asked for time to "do some research" before the judge gave her proposed response to the jury.

(R. 1588) The prosecutor explained that he was unsure whether the jury "has to be unanimous to not find that mitigating factor." (R. 1588-89)

The judge then asked if it was "correct" to tell the jury that its verdict "must be unanimous." (R. 1589) The prosecutor repeated his uncertainty about the point raised by the jury, stating, "[T]he verdict of a mitigating factor to find it has to be unanimous, but to not find it, I don't know that." (R. 1589) "*It probably does*," the prosecutor added, "but I don't know that." (R. 1589, emphasis added). By conceding that the jury "probably" had to unanimously find that no mitigating factor existed before it could convict the defendant of first degree murder, the prosecutor indicated that the right answer to the jury's question might have been "no," as the defense suggested.

After the prosecutor reiterated his uncertainty, he and defense counsel had a brief exchange. Defense counsel emphasized that a deadlock on the existence of a mitigating factor prevented a unanimous verdict finding the defendant guilty of either form of murder, while the prosecutor observed that the jury would still be "unanimous on first degree." (R. 1589) The judge ended the exchange between the parties by declaring, "Well, I don't think this is an incorrect statement of law and a response to this [question]." (R. 1589-90) Although the judge told the prosecutor that he could "do some research with regard to this issue," she then said, "[B]ut at this point in time I am going to send this response back [to the jury], and obviously we will figure out [sic] and hopefully have more clarity. If you wish to do that research, that's fine, but right now what it's going to say is: Your verdict must be unanimous.

Please continue your deliberations." (R. 1590) The prosecutor replied, "That's fine," but defense counsel said nothing. (R. 1590)

The full context of the discussion about the jury question shows that both parties agreed with the trial judge's response. They accepted the judge's decision and chose not to press the point further.

The appellate court wrongly equated "agreement" with "acquiescence." Standing alone, the judge's proposed response – that the verdict had to be unanimous – was obviously "correct" in the limited sense that it conformed to the law. What the appellate court found to be "acquiescence," then, was merely defense counsel's acknowledgment that the proposed response was proper insofar as it went. But whether the verdict had to be unanimous was never in dispute. In its appellate court brief, the State agreed that a defendant "has a substantive right to a unanimous verdict" (St. App. Ct. Br. at 23), and the jury never asked if the verdict had to be unanimous. Instead, the jury asked if it could return a "unanimous" verdict on first degree murder where there was *non-unanimity* about the existence of a mitigating factor. The judge's answer to the jury question was objectionable not because it was *incorrect*, but because it was *insufficient.*

The cases cited by the appellate court and the State to support the invited error finding are distinguishable. Neither *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2001) – cited by the appellate court (2017 IL App (2d) 140930, ¶16) – nor *People v. Cruz*, 2013 IL 113399 – cited by the State (St. Br. at 22) – involved a claim of error based on a trial judge's response to

a jury question. The decision in *Villarreal*, 198 Ill. 2d 209 (2001), which was cited by both the appellate court (2017 IL App (2d) 140930, ¶16) and by the State (St. Br. at 22), involved a challenge to certain verdict forms that the defense itself submitted. 198 Ill. 2d at 227. Here, defense counsel agreed that the trial judge's response to the jury question was "correct," but counsel never abandoned his initial claim that the court should have told the jury that the answer to its question was "no." (R. 1586-90)

Three other cases cited by the appellate court (2017 IL App (2d) 140930, ¶16) and/or the State (St. Br. at 22) did involve attempts to challenge responses to jury questions. *People v. Averett*, 237 Ill. 2d 1 (2010); *People v. Halerewicz*, 2013 IL App (4th) 120388; *People v. Pryor*, 372 Ill. App. 3d 422 (1st Dist. 2007). In those cases, the defendant was barred from challenging the responses because he agreed or acquiesced to them in the trial court. *Averett*, 237 Ill. 2d at 6, 23-25; *Halerewicz*, 2013 IL App (4th) 120388, ¶¶19-23; *Pryor*, 372 Ill. App. 3d at 432-33. Admittedly, defense counsel here, like counsel in *Averett*, *Halerewicz*, and *Pryor* agreed that the trial judge's response to the jury question was "correct." (R. 1588) However, unlike counsel in those cases, counsel here also argued that the court's response should include a more direct answer to the jury's question. (R. 1586-90) Thus, *Averett*, *Halerewicz*, and *Pryor* are not on point

The appellate court (2017 IL App (2d) 140930, ¶16) also cited the decision in *People v. Raue*, 236 Ill. App. 3d 948 (3rd Dist. 1992). Like the defendant here, the defendant in *Raue* was charged with first degree murder

and had a jury trial, at which the jury was also instructed on second degree murder. During its deliberations, the jury in *Raue* asked virtually the same question the jury asked here. The trial judge proposed a response telling the jury: (1) the defendant had the burden to prove the existence of a mitigating factor; (2) if the defendant did not meet that burden, the proper verdict would be first degree murder; (3) however, if the defendant met that burden, the proper verdict would be second degree murder; and (4) any verdict had to be unanimous. 236 Ill. App. 3d at 949, 951-52. Although defense counsel in *Raue* initially argued that the judge should answer the jury question with a "no," counsel agreed that the judge's proposed reply was "satisfactory" and did not object when it was given. 236 Ill. App. 3d at 951-52. By contrast, defense counsel here merely acknowledged that it was "correct" to tell the jury that its verdict had to be unanimous. (R. 1588)

For these reasons, the appellate court wrongly found that the invited error doctrine barred the defendant from challenging the trial judge's reply to the jury question here. The next question, then, is whether the defendant forfeited his claim that the judge gave an erroneous reply.

The State argues that the defendant forfeited that claim by not objecting to the response and omitting the claim from his post-trial motion. (St. Br. at 22) The State's forfeiture argument has the same flaw as its invited error argument: it relies on the false division of the unitary argument that the defendant deserves a new trial because the judge neither answered the jury question correctly nor polled the jury as he requested.

Defense counsel twice asked the judge to poll the jurors specifically to determine whether they unanimously agreed that "the mitigating factor did not exist." (R. 1592-93) After counsel's first request, the clerk asked each juror, "Was [the first degree murder guilty verdict] then and is [it] now your verdict?" (R. 1592) After all twelve jurors answered that question in the affirmative, defense counsel renewed his request for the judge to poll the jurors specifically to see if they each found no mitigating factor, but before counsel could even finish making that request, the judge interrupted and declared that the clerk's polling question was "sufficient" to resolve that matter. (R. 1593) Although defense counsel did not explicitly "object" when the judge refused to honor his second request, he indisputably brought the issue to her attention and gave her a chance to avoid the error. Counsel's post-trial motion also claimed that the judge erred by refusing to poll the jury as he had requested. (C. 594-96) The defense thus preserved that error for review. *E.g., People v. Smith*, 2016 IL 119659, ¶38; *see People v. Carlson*, 79 Ill. 2d 564, 577 (1980)(purpose of requiring a timely objection at trial is to give the trial judge a chance to correct any error).

The State has not argued that the defendant forfeited his right to challenge the judge's refusal to poll the jurors as defense counsel requested. (St. Br. at 23-24) As previously explained, polling the jury as the defense requested was necessary only because the judge did not properly answer the jury question. The two problems are inextricably bound together. (See pp. 22-23, above) Under these circumstances, by preserving the error arising

from the judge's failure to poll the jury as defense counsel requested, the defendant also preserved the error arising from her failure to answer the jury question correctly.

Even if the defendant did forfeit his right to challenge the judge's reply to the jury question, the absence of invited error allows her reply to be reviewed for plain error under Supreme Court Rule 615(a). The defendant has already explained why the reply amounted to error (see pp. 9-15, above), which is the first step in the plain error analysis. *E.g., People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The plain error doctrine has two prongs, and the second prong applies when "a clear or obvious error" was "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Piatkowski,*, 225 Ill. 2d at 565. Second-prong plain error has been used to enforce the one act-one crime rule in a juvenile proceeding. *In re Samantha V.*, 234 Ill. 2d 359, 375-79 (2009). However important the one act-one-crime rule might be in that context, it pales in comparison to a judge's duty to give a direct and proper answer to a jury question bearing on an adult criminal defendant's fundamental right to a unanimous jury verdict. Therefore, if second-prong plain error applies to the former, it should also apply to the latter.

Because second-prong plain error applies "regardless of the closeness of the evidence," *Piatkowski,*, 225 Ill. 2d at 565, the State's harmless error argument is irrelevant. *See also, People v. Keene*, 169 Ill. 2d 1, 17 (1995) (all plain errors are reversible errors).

F. Even If The Failure To Poll The Jury As The Defense Requested Is Regarded As A Distinct Issue, It Also Constitutes Error Warranting A New Trial

As the appellate court held, the jury's question "starkly revealed" its "uncertainty" about whether a split regarding the existence of a mitigating factor allowed it to return a unanimous verdict finding the defendant guilty of first degree murder, and "the standard polling question – 'Was this then and is this now your verdict?' – did not resolve the uncertainty." *Manning*, 2017 IL App (2d) 140930, ¶23. Consequently, the judge's refusal to poll the jury as the defense requested "undermines any reasonable confidence in the verdict." 2017 IL App (2d) 140930, ¶23.

In addressing the jury polling matter, the State never argues that the defendant invited the trial judge's error, that he forfeited his right to challenge that error on appeal, or that the error was harmless. (St. Br. at 23-24) The State has therefore forfeited its right to seek reversal of the appellate court's decision on any of those grounds. *People v. Villa*, 2011 IL 110777, ¶21 (where the State did not argue that the defendant "acquiesced" in the alleged error or forfeited review of that error, the State forfeited those arguments); *People v. Lucas*, 231 Ill. 2d 169, 175 (2008) (forfeiture doctrine applies to the State as well as to the defendant).

Instead, the State argues that the polling here "revealed a unanimous finding of first degree murder" and also showed that the jury did not "unanimously" find a mitigating factor. (St. Br. at 23) The State's argument should be rejected.

The State's first claim – that the polling here "revealed a unanimous finding of first degree murder" – misses the crucial point. The State admits that the defendant had a right "to question the jurors to ensure that he was convicted upon a unanimous verdict," but concludes that his right to such questioning was "satisfied" even though the trial judge refused to ask each juror whether he or she agreed that the defendant had failed to prove any mitigating factor. (St. Br. at 23) The jury question obviously implied that it unanimously found that the State had proved the elements of first degree murder. However, unanimity on that point is not equivalent to unanimity that the defendant was guilty of first degree murder rather than second degree murder. The only way to "ensure" that the defendant was found guilty of first degree murder based "upon a unanimous verdict" would have been to determine whether every juror believed that the defendant had failed to prove a mitigating factor. Otherwise, as the defendant has argued and as the appellate court found, the jury would not be "unanimous on the defendant's guilt of first degree murder." 2017 IL App (2d) 140930, ¶15.

The State's second claim – that the polling here showed that the jury did not "unanimously find" a mitigating factor (St. Br. at 23) – is entirely speculative. The State never explains how it could know that no juror found that the defendant had proved the existence of a mitigating factor when no juror was asked if he or she had made that finding.

The State also argues that the trial judge did not abuse her discretion when she refused to poll the jury to determine if any juror(s) had found the

existence of a mitigating factor. (St. Br. at 23-24) To support that argument, the State cites cases showing: (1) a trial judge has discretion to decide what questions to ask when polling a jury; (2) the "double-barreled" question asking the jurors, "Was this then and is this now your verdict?" has often been used and been approved by this Court; (3) no Illinois decision requires a judge to ask the jury additional questions after each juror has unequivocally concurred in the verdict; and (4) polling should not be used as an opportunity to prompt further deliberations, to influence the verdict, or to "interpret and disrupt" an unambiguous verdict by probing into the juror's minds or their deliberative process. (St. Br. at 23-24) The defendant has no quarrel with any of those propositions. None of them, however, are relevant here.

Polling the jurors to determine if any of them believed that the defendant had proved the existence of a mitigating factor was necessary to ensure that he was convicted of first degree murder based on a unanimous verdict, which even the State concedes the defendant had the right to ascertain. (St. Br. at 23) And polling the jurors to make that determination would have been simple: each juror would have needed only to answer a direct "yes or no" question: "Do you agree that the defendant failed to meet his burden to prove, by a preponderance of the evidence, the existence of a mitigating factor that would reduce the offense to second degree murder?" Asking such a question would neither have unduly intruded into the juror's deliberative process nor influenced its verdict. Contrary to the State's assertions, the verdict finding the defendant guilty of first degree murder

was ambiguous: the verdict failed to show whether each juror agreed not only that the State *had proved* each element of first degree murder, but also that the defendant *had not proved* a mitigating factor. Polling the jury as the defense requested would have quickly and easily clarified that ambiguity. Moreover, as discussed earlier, this Court requires a judge to give the jury direct and specific guidance when it expresses confusion about the applicable law, even if the jury was already correctly instructed. *People v. Childs*, 159 Ill. 2d 217, 228-31 (1994).

Accordingly, although a trial judge may generally have discretion when deciding how to poll a jury, a judge cannot be said to have properly exercised her discretion where she needed to ask the jury a specific question to fulfill her duty under *Childs*. Finding an abuse of discretion is especially warranted where, as here, the jury was undoubtedly confused on a point of law involving the defendant's fundamental right to a unanimous verdict.

Finally, even if the State can belatedly make a harmless error argument on this issue, any such argument would fail. The State raised a harmless error argument regarding the judge's failure to give a proper answer to the jury question, but that argument hinged on the irrelevant assertion that the evidence, particularly the defendant's statement that he was angry with the deceased and wanted to kill him, "demonstrated that no mitigating circumstance existed at the time of the murder." (St. Br. at 21)

That assertion is irrelevant for multiple reasons. First, it ignores the possibility that the defendant was angry and wanted to kill because he had

been *provoked* by the deceased. Second, it fails to consider a crucial fact, namely, that the judge found enough evidence to give the jury a self-defense instruction, as well as second degree murder instructions based on both statutory mitigating factors: unreasonable belief in self-defense and provocation. (R. 1575-80) Third, the jury's question itself makes the State's assertion irrelevant. The question strongly implied that the jury was split as to whether the defendant had proved the existence of a mitigating factor. (C. 590)

Notably, the jury returned its verdict only about 40 minutes after it submitted its question. (R. 1586, 1591) Given the strong probability of a split regarding the existence of a mitigating factor shortly before the verdict was returned, this Court cannot reasonably find that all twelve jurors would have answered "no" if the trial judge had asked them if they agreed that the defendant failed to prove a mitigating factor. Without knowing the answer to that question, this Court cannot tell if the verdict finding the defendant guilty of first degree murder was truly unanimous.

G. Recap

The trial judge received a jury question explicitly raising a potentially decisive point of law: whether a split about the existence of a mitigating factor meant that the verdict would "revert" to guilty on first degree murder. The judge had a duty to answer that question, but she failed to do so, thereby leaving the jury to speculate about its options. The judge should have told the jury that a deadlock about the existence of a mitigating factor would bar

it from returning any verdict at all, because it would then be impossible to return a "unanimous" verdict The damage caused by the judge's failure to answer the jury could have been repaired if the judge had later granted a defense request to poll the jury to determine if any juror(s) believed the defendant had proved a mitigating factor. But the judge denied that request. In sum, the judge failed to protect the defendant's basic right to a unanimous verdict. Ill. Const. Art. I, §13; 725 ILCS 5/115-4(o) (2008); *People v. Gallano*, 354 Ill. App. 3d 941, 952-63 (1st Dist. 2004). To uphold that right, this Court should affirm the appellate court's judgment, reverse the defendant's first degree murder conviction, and remand the cause for a new trial.

CONCLUSION

For the foregoing reasons, the defendant-appellee, Arthur Manning, respectfully asks this Court to affirm the appellate court's judgment, reverse his conviction for first degree murder, and remand the cause for a new trial.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I, Paul Alexander Rogers, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). Its length – excluding 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 35 pages.

/s/Paul Alexander Rogers
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Supervisor

No. 122081

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 2-14-0930.
Plaintiff-Appellant,	)	There on appeal from the Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois, No. 08 CF 2729.
-vs-	)	
ARTHUR MANNING	)	Honorable Susan Clancy Boles, Judge Presiding.
Defendant-Appellee	)	

NOTICE AND PROOF OF SERVICE

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Under penalties as provided in 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 November 28, 2017, the Appellee's Brief was filed with the Clerk of the Supreme Court of Illinois using this Court's electronic filing system. Upon the acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system. Also, one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in Elgin, IL, with proper postage prepaid. Upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Appellee's Brief and Argument to the Clerk of the above Court.

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