No. 1-12-2459

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- ANTHONY JOHNSON, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County, Illinois 04 CR 15600 Honorable Arthur F. Hill, Jr., Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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NATURE OF THE CASE

After a jury trial, Anthony Johnson was convicted of first degree murder. (R. C364). On July 26, 2012, he was sentenced to serve 37 years in the Illinois Department of Corrections for the offense of first degree murder. (R. C364).

This is a direct appeal from the judgment of the court below. No issue is raised regarding the pleadings.

ISSUES PRESENTED AND STANDARD OF REVIEW

1. Whether the prosecution proved the defendant guilty beyond a reasonable doubt.

   A court will of review will overturn the fact finder's verdict if "the proof is so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt." *People v. Schott*, 145 Ill.2d 188, 202-03, 582 N.E.2d 690 (1991).

2. Whether the trial court erred by refusing to instruct the jury that, for purposes of accountability, the duration of the commission of the offense is defined by the elements of the offense and that it is the killing involved, not the flight or escape, which constitutes the offense of first degree murder.

   The decision of the trial court not to give a non-IPI instruction is reviewed for abuse of discretion. *People v. Ramey*, 151 Ill.2d 498, 536, 603 N.E.2d 519, 534-35 (1992).

3. Whether the trial court erred by allowing the prosecution to impeach Clayton Sims with his failure to prevent his lawyer from "lying" to his jury by telling them that he was not guilty.

   While "ordinarily," *People v. Aguilar*, 265 Ill.App.3d 105, 109, 637 N.E.2d 1221, 1223-24 (3d Dist. 1994), or "generally," *Jackson v. Graham*, 323 Ill. App. 3d 766, 773, 753 N.E.2d 525, 531 (4th Dist. 2001) a trial court's evidentiary rulings are reviewed under an abuse of discretion standard, an appellate court should review de novo where the trial judge's decision "involves a legal issue

and did not require the trial court to use its discretion regarding fact-finding or assessing the credibility of witnesses." *Aguilar,* 265 Ill. App. 3d at 109, 637 N.E.2d at 1223-34. Since the trial court's mistaken ruling that Shannon Polk needed to be qualified as an expert involved a legal issue and did not require the court to use its discretion regarding fact-finding or assessing the credibility of witnesses, the standard of review should be de novo.

4. Whether the prosecutor deprived Anthony Johnson of a fair trial and committed plain error by cross-examining Clayton Sims as to whether he was an "honest guy," whether he had deceived his own jury by pleading not guilty, by letting his lawyer tell his jury that he was not guilty, and by letting the victim's mother "suffer" by not telling the jury that he was guilty.

   The plain-error doctrine allows a reviewing court to consider forfeited error when (1) the evidence is closely balanced or (2) the error is 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. *People v. Walker,* 232 Ill.2d 113, 124, 902 N.E.2d 691, 697 (2009). Under either prong of the plain-error analysis, the defendant has the burden of persuasion. *Lewis*, 234 Ill. 2d at 43, 3 912 N.E.2d at 1227.

5. Whether the prosecutors deprived Anthony Johnson of a fair trial by stating that a not guilty verdict would make a "mockery of the system," "legalize drive by shootings," "sicken" the jurors who acquitted a codefendant at an earlier trial and lead to a trend of "duping" juries with "lies," and "bogus defenses."

   Recent cases of the Illinois Supreme Court on this topic hold that "whether statements made by a prosecutor at closing argument were so egregious that they

warrant a new trial is a legal issue this court reviews de novo." *People v. Wheeler*, 226 Ill. 2d 92, 121, 871 N.E.2d 728, 744 (2007). Accord, *People v. Graham*, 206 Ill.2d 465, 474, 795 N.E.2d 231 (2003); *People v. McCoy*, 378 Ill.App.3d 954, 964 (3d Dist.2008) ; *People v. Palmer*, 382 Ill.App.3d 1151, 1160 (4th Dist 2008). But see *People v. Love*, 377 Ill.App.3d 306, 313 (1st Dist. 2007) and *People v. Averett*, 381 Ill.App.3d 1001, 1007 (1st Dist. 2008)(both holding that the standard of review is abuse of discretion). A recent case on this issue from the Illinois Appellate Court, First District states that the standard of review is "not clear." *People v. Phillips*, 2009 WL 1685901, 24 (Ill. App. 1st Dist. June 15, 2009). It is the position of the defense that the proper standard of review is de novo, particularly in light of the trial court's erroneous overruling of defense objections.

6. Whether defendant was deprived of a fair trial when the prosecutor unfairly argued in summation that defendant was attempted to raise the defense of compulsion to the crime of murder and compared that defense to the defenses used by the Nazis at Nuremberg.

   See Standard of Review for Issue 5.

7. Whether defendant was deprived of a fair trial when the prosecutor falsely told the jury that there were "no bystanders who could tell us anything useful in the case" when the prosecutor knew that a bystander had testified for the prosecution in the prior trial.

   See Standard of Review for Issue 5.

8. Whether the defendant was deprived of effective assistance of counsel by counsel's failure to call Alexander Weatherspoon as a witness.

In deciding whether counsel provided ineffective assistance, Illinois appellate courts employ a bifurcated standard of review, wherein they defer to the trial court's findings of fact unless they are against the manifest weight of the evidence, but appellate courts consider de novo the ultimate legal issue of whether counsel's actions support an ineffective assistance claim. *People v. Stanley*, 397 Ill. App. 3d 598, 612 (2009)

9. Whether the trial court violated defendant's due process rights by increasing his sentence by nearly 50% after retrial.

   Although the trial court has discretion to impose a sentence, Illinois courts review potential sentencing errors *de novo* if they involve a question of law. *People v. Chaney*, 379 Ill.App.3d 524, 527, 884 N.E.2d 783 (2008).

JURISDICTION

Anthony Johnson appeals from a final judgment of conviction in a criminal case. He was sentenced on July 26, 2012. (R. C364). Notice of appeal was timely filed on August 1, 2012. (R. C365). Jurisdiction therefore lies in this Court pursuant to Article VI, Section 6, of the Illinois Constitution, and Supreme Court Rules 603 and 606.

STATEMENT OF FACTS

Defendant Anthony Johnson was only 17 years old on October 1, 2003, when he allegedly drove away from the scene of a shooting, allegedly with the shooter in his vehicle. The alleged shooter, Clayton Sims, was later acquitted; but Anthony Johnson was convicted on October 10, 2007 by a separate jury in a simultaneous trial of first degree murder. He was sentenced on January 16, 2008, to 30 years imprisonment. (R. C24).

On appeal, this court reversed his conviction. (R. C100). The court first found that errors which occurred in responding to a series of notes from the jury were not harmless beyond a reasonable doubt (R. C56-59) because evidence of the Johnson's guilt was "far from overwhelming." (R. C58, C100). Second, the court found that responding to the jury's notes without Johnson present was reversible as plain error because the evidence was "closely balanced." (R. C97).

On remand, Anthony Johnson was again convicted by a jury (R. IV, 130). He was resentenced to 47 years imprisonment. (R. V, 140).

The evidence at the second trial was essentially similar to the evidence at the first trial, with two major exceptions. First, the prosecution called Alexander Witherspoon, an eyewitness to the shooting, in the first trial (S.R. 117-182), but did not call him in the second trial. Second, the defense called no witnesses in the first trial (R. C31) but called Clayton Sims, the alleged shooter, to give exculpatory testimony in the second trial. (R. IV, 3-51).

I: Summary of Evidence at Trial

The State's evidence included testimony by detectives about their interviews of the 17-year old Anthony Johnson, after officers approached him on the street and transported him to a police station at 8 p.m. on December 4, 2003. The interviews started at 1 a.m. on December 5, 2003,·and lasted through the afternoon of the same day, and culminated in Anthony's release from custody, without charges.

The State's evidence also included testimony by an event witness, Nolan Swain, who did not identify Anthony at trial as the driver of the shooter's vehicle and testimony by Rufus Johnson, the alleged vehicle owner, who at trial denied owning the vehicle. Swain testified at trial that Anthony drove the vehicle that Swain was in, but denied that the shooter ever entered their vehicle; and at trial Johnson denied owning the vehicle. Swain also claimed to have smoked marijuana before testifying, as he admitted that he does most days. Swain testified that he used marijuana every day, and thus his memory of the night in question was sketchy. He testified that, on the night of the shooting, he and defendant were driving around; drinking alcohol, smoking marijuana, and looking for girls; and that the alleged· shooter, codefendant Sims never entered their vehicle.

Swain testified that the drug charges were, in fact, dropped; without his ever going to court. Swain admitted that he told detectives that codefendant Sims was in the back seat of their vehicle, that they spotted the. victim in another vehicle; that both vehicles drove to the scene of the shooting, where Sims shot Baity; and that afterwards, defendant drove away with Sims and Swain in 'his vehicle. Another State witness, Rufus Johnson (Johnson), was arrested in the same drug sweep as Nolan Swain. At trial, Johnson who is no relation to defendant, denied either that he owned the vehicle which

defendant drove or that defendant told him about a shooting. The drug charges against Johnson were later reduced, and he was sentenced to four years in prison, instead of the minimum of nine years which he originally faced.

At trial, the State called two detectives who had interviewed the 17-year old defendant at two different times on the same day, starting at 1 a.m, and lasting until 3 p.m. On December 5, 2003, Detective Las Colas interviewed defendant starting at 1. a.m.; and Detective Winstead interviewed him starting at 2:30 p.m. After the last interview and after defendant had spent the better 'part of a day in custody, Detective Winstead, a veteran. of almost 30 years, released defendant, without any attempt to seek charges. There was no· testimony at trial that defendant was interviewed by an assistant state's attorney, or that defendant signed a statement. Each of the interviews contained slightly different information, but in both interviews, defendant allegedly stated that he drove the vehicle in which Sims, the acquitted shooter, drove to and away from the shooting. Defendant also stated that he did not know there was going to be a shooting, and that he drove Sims away because he was afraid of future revenge by the machine gun-wielding Sims if he did not.

Anthony did not testify, but called Clayton Sims as a witness. Sims testified that Anthony picked him up in a car in which Swain was a sleeping passenger. Sims told Anthony to follow Brandon Baity's car to a drug spot so that Sims could buy some weed, but did not tell Anthony that he was carrying a gun and intended to shoot Baity. Sims said that Anthony pulled in front of Baity's car at Sims' request, Sims got out and shot Baity, but Anthony drove away and left Sims at the scene.

II. Event Witnesses

A. Nolan Swain, Vehicle Passenger

Nolan Swain, the State's principal witness, had convictions for manufacture and delivery of cannabis and for possession of a controlled substance with intent to deliver. (R. II, 63) and drug possession. Swain testified that at the time of trial he had known Clayton Sims for about eight years (R. II, 64-65) and had known Anthony Johnson since Swain was a child. (R. II, 66).

On the evening of September 30, 2003, Anthony picked up Swain in a car. The car had four doors and might have been a Pontiac, possibly a Grand Am. It might have been gray in color. (R. II, 66). Swain knew Rufus Johnson but was unsure of whether the car belonged to Rufus Johnson. (R. II, 67).

Anthony and Swain rode around smoking and drinking. During this time, defendant was driving, and Swain was in the passenger seat. (R. II, 67).

Swain denied that he saw Clayton Sims in the early morning hours of October 1, 2003. Swain was not sure whether he and Anthony picked Clayton Sims up during that time period, whether Sims was picked up near 70th and Eggleston, whether Sims got into the back seat, and whether Anthony and Sims were going to drop Sims off at home. He was also not sure if the three drove down 71st street. (R. II, 69).

Swain denied knowing or recalling that as the three were driving down 71st street, Clayton Sims said, "there goes that dude that shot me," (R. II, 69), that the "dude" was someone Swain knew as Brandon, that Brandon was driving a cream colored car, that Sims told Anthony to chase the car, and that Anthony made a U-turn and started chasing the cream colored car. (R. II, 70).

Swain further denied that Anthony turned the car onto Emerald Street, that Sims told Anthony to let Sims out of the car, that Brandon was alone in the cream colored car and that Anthony pulled up a little bit ahead of Brandon's car. He also denied that he heard a voice say: "Do you want some weed?" (R. II, 71).

Swain denied seeing Sims begin shooting at Brandon while Brandon was sitting, unarmed, in the driver's seat of the cream colored car. (R. II, 72). Swain stated that he was asleep in the car during the entire incident (R. II, 73-74) and that he woke up the next day in a female's house. (R. II, 73). He was intoxicated and had just gotten out of boot camp. He was not used to drugs. (R. II, 74).

Swain also denied that Anthony inched the car forward as Sims was shooting at Brandon, that he heard squealing tires, that Brandon's car hit the rear driver's side of the car Anthony was driving, that he heard glass shatter, that Sims ran back to the car, and that Sims had a Mac-10 in his hand. (R. II, 75). He further denied that Sims got back in to the car and that Anthony then drove Swain and Sims to 70th and Eggleston where Anthony dropped Sims off. Lastly, he denied that Anthony Johnson drove to an alley at 71st and Vincennes where he ditched the car. (R. II, 76).

Swain admitted that he went to a "lady's house" with Anthony Johnson, where he slept, and that the next day he took the El back to Maywood. (R. II, 76).

Swain testified that on December 5, 2003, Chicago police officers transported him to a police station, where he was questioned about the shooting by a detective. He could not remember whether he had initially told the detective that he did not know anything. (R. II, 77). He also denied that his mother had come into the interrogation room and urged him to tell the truth and that he had then told Winstead the truth. (R. II, 78-79).

Swain specifically denied telling Winstead certain things and/or stated that he could not remember saying certain things. He admitted telling Winstead that on September 30, 2003, he was driving around with Anthony Johnson in a gray Grand Am (R. II, 79), that he and Johnson were smoking marijuana and talking to local girls (R. II, 80), that he eventually went to a woman's house where he fell asleep, that when he woke up his friends were gone, and that he took the El to Maywood. (R. II, 83).

Swain could not remember telling Winstead that on September 30, 2003 he was hanging out at 70th and Eggleston, (R. II, 79), that he might have given one of the girls a ride, that Anthony wanted to go to a girl's house at 72d and Union and that Anthony went into the girl's house while Swain drove the car around (R. II, 80), that Swain did not drive too far because he was "high," that Anthony came out and drove the Grand Am, that Swain was reclining in the front seat, that Anthony and Swain picked up Clayton Sims and 70th and Eggleston, and that Clayton got into the back seat. (R. II, 81).

Swain also could not remember telling Winstead that he heard shots and looked up to see if he was a target, that he saw Clayton shooting at a car, that the car Clayton was shooting at crashed into the left side of the Grand Am, that it then crashed into some parked cars, that Clayton ran to the Grand Am and kept shooting at the other car (R. II, 82) , and finally that Anthony and Swain dropped Clayton off and ditched the car . (R. II, 82-83).

On May 7, 2004, Swain, together with many other people, was picked up in a big drug sting an brought to a police station in Homan Square. (R. II, 83-84). Swain could not remember speaking to detectives or telling them anything which had happened before, during, or after the shooting (R. II, 84-89); he also could not remember speaking with an assistant states attorney. (R. II, 90). He acknowledged his signatures on a

written statement. (R. II, 91-96), but stated that he had only signed the statement because he had been beaten by police officers (R. II, 97) who punched him in the stomach and in the chest, and kept him in an air conditioned room all night without clothes. (R II, 98, 126-27).

Swain acknowledged that the statement said, in essence, that on September 30, 2003, he was a passenger in a grey Grand Am car driven by Anthony (R. II, 107), that shortly before 1:15 a.m. on October 1, 2003, they picked up Clayton Sims (R. II, 108) in order to drop him at his "crib" (R. II, 110), that he heard Sims shout out "there goes that dude that shot me," that he saw Brandon Baity driving a cream colored car (R. II, 111), that Anthony chased the cream colored car (R. II, 112), that at Clayton's request, Anthony let Sims out at 6907 Emerald (R. II, 113), that Anthony pulled slightly ahead of Brandon Baity's parked car (R. II, 115-16), that he heard a voice say something like, dude, want some weed (R. II, 116), and that Sims walked up to Baity's car and opened fire. (R. II, 117) at least six times (R. II, 119). The statement also said that as Sims was shooting, Anthony let his foot off the brake, inching the car forward (R. II, 120) and that Brandon then attempted to move his car out of his parking spot and crashed his car into parked cars. (R. II, 121). Sims came back into the car, holding a Mac-10. (R. II, 122). Anthony then drove to 70th and Eggleston where Sims got out of the car. (R. II, 132).

In 2010, Swain smoked marijuana every day. (R. II, 138). After his arrest for conspiracy (R. 141-42) , he was taken to three police stations. He was told if he said what the police wanted him to say, he would go home. (R. II, 142-43). He was, in fact, charged with a drug case, but was immediately released and did not have to go to court. (R. II, 143). He was drunk and high on the day of the shooting (R. II, 145). Before the shooting he did not see Sims with a weapon and did not hear any conversation about

Brandon Baity. (R. II, 145 148).

Detective Chester Bach testified that on May 7, 2004 he went to Homan Square to interview suspects picked up in a drug sweep. (R. III, 7-11). He interviewed Nolan Swain. (R. III, 15). Swain told him about being in the car with Sims and Anthony Johnson, about Sims telling Anthony to follow the car, and about the shooting. (R. III, 16-20). Bach interviewed Swain after he spoke with Rufus Johnson. (R. III, 26). Swain did not see a gun before the shooting. (R. III, 27). Detective Chester Bach testified that on May 7, 2004 he went to Homan Square to interview suspects picked up in a drug sweep. (R. III, 7-11).

The State's witness, Detective Edward Winstead, testified that he had interviewed both Anthony Johnson (R. III, 90) and Swain (R. III, 105). By the time of trial, Detective Winstead was retired; but he had been a Chicago police detective for 35 years (R. III, 88) and a homicide detective for 29 years (R. III, 89) on December 5, 2003, when he interviewed defendant and Swain.

On December 5, 2003, officer Garza, at Winstead's request located Nolan Swain Mineand brought Swain to Area 1. (R. III, 105) After Swain arrived at approximately 8:00 p.m., Winstead placed him in an interview room, "explained to him why he was there" and read him his Miranda warnings. At first, Swain denied knowledge of the Baity shooting. (R. III, 105).

However, Swain's mother, Linda Truman, arrived and spoke to him (R. III, 105-06) and then Winstead interviewed Swain again. (R. III, 106). During the second interview, Swain told Winstead that he was picked up by Anthony Johnson in a grey Grand Am near 70th Street and Eggleston Avenue, and they drove around, smoking marijuana and talking to girls. Swain told Winstead that, at some point that evening,

they. picked up Clayton Sims, who got in the backseat. Swain fell asleep in the front passenger seat. (R. III, 107).

Swain told Winstead was woken up by the sound of gunfire.. He saw Sims firing at a cream colored Mercury that pulled off and hit their car. Anthony Johnson was still driving. They drove back to Eggleston where Sims got out. Swain and Anthony parked the car in an alley on 70th and Vincennes. They walked back to the neighborhood where they met Sims again. Then they went to a girl's house where Swain fell asleep. (R. III, 108). In the morning he returned to Maywood. (R. III, 109).

Andreana Turano, an Assistant States Attorney, testified that on May 8, 2004, just after midnight, she interviewed Swain. (R. III, 128). She gave Swain Miranda warnings. (R. III, 130-31). She interviewed Swain with detective Lutzow present. (R. III, 122, 128). She also spoke to him without Lutzow present to make sure that he had not been threatened or had been promised anything (R. III, 131) and he did not make any complaints about being beaten. (R. III, 131-32). She knew that he was in custody for a drug case (R. III, 132) but claimed that she told him that there were no deals with respect to the drug case. (R. III, 133).

Turano claimed that Swain agreed to make a handwritten statement, which she wrote out for him. (R. III, 144). The statement was admitted over defense objection and reads as follows:

"Statement of Nolan Swain taken May 8, 2004, 10 at 3: 19 a. m at Area 1, Police Headquarters. Present Assistant State's Attorney Andreana Turano Michiels, Detective Brian Lutzow, Star No. 21328. This statement taken regarding the shooting of Brandon Baity which occurred on October 1, 2003, at 6907 South Emerald at 1: 15 a. m. I understand I have the right to remain silent and that anything I say can be used against

me in a court of law. I understand that I have the right to talk to a lawyer and of him present with me during questioning. And if I cannot afford to hire a lawyer, one will be appointed by the court to represent me before any questioning. Understanding these rights I wish to give a statement. And then it's signed by Nolan Swain. After being advised of his constitutional rights and stating that he understood those rights, and also after being advised that Assistant State's Attorney Andreana Turano Michiels is a lawyer and a prosecutor, but not his lawyer, and not a lawyer for anyone else involved in this case, Nolan Swain agreed to give the following statement, which is a smmary and not word for word. Nolan Swain states that he is 18 years old, and his date of birth is January 29, 1986. Nolan Swain states that he lives at 611 North 6th Avenue in Maywood with his Aunt Georgette Bennett and has lived at that address since September 4, 2003. Nolan Swain states he attended Proviso East for one year. Hirsch Metropolitan for one year, and received his GED in boot camp. Nolan Swain states that he identified the person in People's Exhibit 1 as Yogi. Nolan states that Yogi's full name is Anthony Jolmson. Nolan states that he has known Yogi since he was a young kid. Nolan states that he identified the person in People's Exhibit 2 as Clayton Sims. Nolan states that has he has known Clayton for about three years and knows Clayton from the neighborhood. Nolan states that he identified the person in People's Exhibit 3, as Brandon Baity. Nolan states that he does not know Brandon, but recognized Brandon as the person that Clayton shot and killed on October I, 2003. Nolan states that on September 30, 2003, he and Yogi were driving around in a gray Grand Am car. Nolan states that the car belonged to Rufus Jolmson. Nolan states that he was just chillin' at 70th and Eggleston on September 30, 2003. Nolan states that by chillin' he means that he was just hanging out. Nolan States that Yogi had already gotten the keys to Rufus'

car. Nolan states that he and Yogi just drove around in the gray Grand AM car. Nolan states that shortly before 1: 15 a.m., on October 1, 2003, he and Yogi picked up Clayton at 70th and Eggleston. Nolan states that Yogi was driving the gray car, and he was sitting in the front seat passenger side. Nolan states that Clayton, who he identified in People's Exhibit 2, got into the back seat of the gray car. Nolan states that they were going to drop off Clayton at the crib. By" crib" Nolan means that they were going to drop off Clayton at his house. Nolan states that he does not know where Clayton lived at that time. Nolan states that as they were on 71st, he heard Clayton loudly state, there goes that dude that shot me. Nolan states that he saw Brandon, who he notified in People's Exhibit 3, driving the cream colored car. Nolan states that Yogi made a right turn and chased after the cream colored car that Brandon was driving. Nolan states that Yogi drove the car to Halsted and then to 69th and then to Emerald. Nolan states that Yogi was driving the car fast, and when they got to approximately 6907 South Emerald, he heard Clayton state, let me out right here. Nolan states that parked at the curb was Brandon in his cream colored car. And Brandon was still seated in the driver's seat. Nolan states no one else was in Brandon's car. Nolan states that Yogi had pulled the car up so that their car was a little bit ahead of Brandon's car. Nolan states that he heard a voice that said something like, Do you want some weed. Nolan states weed is marijuana. Nolan states that he saw Clayton walk up to the passenger side front of Brandon's car and open fire. Nolan states that Clayton was firing his gun directly at Brandon. Nolan states that Brandon was still seated in the driver's seat of his car. Nolan states that he did not see Brandon with any weapons. Nolan states that he, Clayton, was firing his un because he heard the sound of gunshots and saw the flashes from the muzzle fran Clayton's gun. Nolan states that he heard and saw Clayton fire his

gun many times at least over six times. Nolan states that Clayton did not have anything covering his face. Nolanstates that Yogi had left his foot off the brake so that their car was inching forward. Nolan states that he heard the sound of tires squealing as he saw Brandon attempting to rrove his car out of the parking spot and 5 into the street in order to flee from Clayton, who was still firing his gun at Brandon. Nolan states that Brandon's car hit the rear driver's side of the car that Yogi was driving. Nolan states that he then heard loud noises and loud crashing which sounded like Brandon's car was crashing into parked cars. Nolan states that he heard the sounds of glass shattering as well. Nolan states that Clayton ran up to their car and got back in. Nolan states that Clayton had a Mack 10 in his hands as he was firing and as he came back to the car. Nolan states that a Mack 10 is like a semi -automatic machine gun with a big clip. Nolan states that when Clayton got back into the car, he still had the gun in his hands and was placing it near his waist. Nolan states that Yogi drove to 70th and 20 Eggleston where Clayton got out of car with his gun. Nolan states that Yogi then drove himself, and Yogi to 71st and Vincennes, into the alley where he and Yogi jumped out of the car and left the car there. Nolan states that he then went to a house with Yogi and then 1 took the L or a train subway to Maywood the next day. Nolan states that no threats or promises have been made to him in exchange for giving this statement, and that he is giving this statement freely and voluntarily because it is the truth. Nolan states that he has had a couple of cheese burgers to eat, Pepsi to drink, and cigarettes to smoke. And Nolan states that he has been allowed to use the restrooms whenever he wanted. Nolan states that he is not under the influence of drugs or alcohol. Nolan states that he has been treated fair by the police and detectives and fair by the state's attorney. Nolan states that he has been arrested on drug charges and no deals or promises have been made to him

on that case or any other pending matter in order for him to give this statement. Nolan states that he can read and write English and demonstrated this by reading a loud this entire statement while the detective and the state's attorney followed along. Nolan states that he was allowed to make any changes, corrections, or additions to the statement that he wanted, and has nothing further to add at this time." (R. III, 146-51).

On cross-examination, Turano admitted that she did not give Swain the opportunity to write out his own statement and did not tape her interview. (R. III, 163).

B: Rufus Johnson, vehicle owner

Rufus Johnson admitted knowing Nolan Swain and Anthony Johnson (R. II, 155) but denied that in September 2003 he owned a gray Pontiac Grand Am which was registered in the name of another person. (R. II, 156). He denied that on October 1, 2003, he lent the car to Anthony Johnson. (R. II, 157-58). He also denied that about a week after September 30, 2003, he met up with Anthony to ask Anthony what Anthony had done with the car. (R. II, 158, 162).

Johnson denied that on September 30, 2003, Anthony met up with him and told Johnson "something to the effect of I am not going to lie, we pulled a move from the car." (R. II, 158). He denied that "pulled a move" could mean shooting someone from the car (R. II, 159) and was impeached with prior testimony where he said that "pulled a move" could possibly mean shooting someone. (R. II, 160-61). Johnson denied that he knew what "pulled a move" meant. (R. II, 159). He also denied that Anthony told him that Anthony Sims saw a guy named "B" by a White Castle (R. II, 153), that "B" was "strapped," (R. II, 163-64), that Anthony and Sims pulled up to B, who was in a car, that Sims asked B if he had any weed (R. II, 165-66), and that Sims then jumped out of the car and started shooting at B. (R. II, 165).

Johnson twice defied subpoenas to come to court (R. II, 166) and was convicted of contempt. (R. II, 167). He had four felony drug convictions. (R. II, 167-68). On May 7, 2004 he was arrested as part of a "big drug sweep." (R. II, 168). He denied telling the detectives who arrested him about a conversation with Anthony Johnson. (R. II, 169-74). He could not remember being taken to a police station and speaking with an Assistant States Attorney. (R. II, 175). He further could not remember telling an Assistant States Attorney about any conversations with Anthony Johnson. (R. II, 176-182). He acknowledged signing a written statement. (R. II, 185- 190). He acknowledged that the written statement contained information about his ownership of the car and the conversation with Anthony Johnson but denied that he told that information to the Assistant States Attorney (R. II, 190-208).

A couple of weeks later, Johnson was still in custody when he was taken before the grand jury. (R. II, 209-10). After he testified before the grand jury he made a deal in his drug case and went to prison for four years. (R. II, 210). He did not remember testifying before the grand jury consistent with the written statement. (R. 213-37).

Johnson admitted that when he was in custody he knew that he was facing a lot of time for the drug conspiracy and that he was looking for help on the case from the police. (R. II, 244-45). He said that "busted a move" could mean buying drugs or beating someone up. (R. II, 246).

Detective Chester Bach testified that on May 7, 2004 he went to Homan Square to interview suspects picked up in a drug sweep. (R. III, 7-11). He testified that he interviewed Rufus Johnson (R. III, 12). Johnson told him about lending the Pontiac Grand Am four door to Anthony Johnson and about the conversation with Anthony where Anthony told Johnson that he and Sims had "made a move" on a guy in his car.

(R. III, 12-14).

Bach admitted that Johnson had not mentioned Swain (R. III, 23) and that Swain was not mentioned in Johnson's conversation with Anthony. (R. III, 25).

Andreana Turano, an Assistant States Attorney, testified that on May 7, 2004, she interviewed Rufus Johnson. (R. III, 123). She knew that he was in custody for a drug case and claimed that she told Johnson that she was not promising him anything with respect to his drug case. (R. III, 127-28).

Turano testified that Johnson signed the following written statement:

"Statement of Rufus Johnson. Taken May 8, 14 2004 at 12:47 a.m. at Area I, Police Headquarters. Present, Assistant State's Attorney Andreana Turano Michiels. Detective Brain Lutzow, Star No. 21328. This statement taken regarding the shooting of Brandon 18 Baity, which occurred on October I, 2003, at 6907 South 19 Emerald at 1: 15 a. m. After being advised that Assistant State's Attorney Andreana Turano Michiels is a lawyer and a prosecutor, but not his lawyer, not a lawyer for anyone else involved in this case, Rufus Johnson agreed to give the following statement, which is a summary and not word for word. Rufus Johnson states that he is 20 years old and his date of birth is July 14, 1983. Rufus states that he lives at 658 East 91st Street one the second floor in Chicago, with his mother, Janet Johnson, and has lived at that address for three years. Rufus states that he graduated from Hyde Park Career Academy and attended Kermedy King College 7 where he studied culinary arts. Rufus states that last year in 2003 he owned two cars. Rufus States that in the Fall of 2003, specifically in September and October of 2003, one of the cars he owned was a gray Pontiac Grand Am that had four doors. Rufus states that the name on the title of this car was the name of Ramon Dill, but that he, Rufus, had physical ownership of the car. Rufus states that around

September 30, 2003, Yogi had asked to use this gray car. Rufus states that he identified People's Exhibit 1 as Yogi. Rufus states that Yogi's real name is Anthony Johnson. Rufus states that he has known Yogi about four years and met through mutual friends. Rufus states that the keys to this gray Grand Am had been lost, and Yogi found the keys to the car in a neighbor's yard. Rufus states that he has another car, a Chevy Caprice wagon that he would use. Rufus states that on September 30th, Yogi told him he had found the keys and wanted to use the gray car. Rufus states that he told Yogi to return the car the next morning, meaning on October 1, 2003. Rufus states that Yogi then took the gray Grand Am. Rufus states that on October 1, 2003, his car was not returned to him. Rufus states that he kept trying to contact Yogi to locate his car. Rufus states that at about a week later he saw Yogi at 70th and Eggleston. Rufus States that he saw Yogi on the sidewalk and asked Yogi where his gray Pontiac Grand Am was. Rufus states that Yogi told him that he wasn't going to lie, and that they pulled a move from the car. Rufus states that, pulled a move, means that someone shot someone. Rufus states that Yogi told him that he and Clayton were in the gray car at White Castle at 67th and Halsted. Rufus states that Yogi told him that Yogi and Clayton saw the guy named B by the White Castle. Rufus states that Yogi told him that Clayton was strapped. By strapped, this means that Clayton had a gun on him. Rufus states that Yogi told him that they followed B over to 69th and Emerald. Rufus states that Yogi told him that he, Yogi was driving the car -- the gray car, excuse me. Rufus states that Yogi told him that when they pulled up next to B, who was in his car, Clayton asked B if he had any weed. By weed, this means marijuana. Rufus states that Yogi told him that Clayton jumped out of the car and started shooting at B. Rufus states that he identified People's Exhibit 2 as Clayton. Rufus states that he knows Clayton from Eggleston, and has

known him for about four years. Rufus states that Yogi never said that B had any weapons. Rufus states that Yogi did not state that Clayton had been shot at before. Rufus states that after Yogi told him about the shooting, Rufus states that he told Yogi that it's his car, meaning Rufus did not want the gray car anymore, and Yogi could keep it. Rufus states that he never saw his gray car again. Rufus states that the conversation he had with Yogi about the shooting of B was referring to the shooting that happened on October I, 2003 at 69th and Emerald. Rufus states that he has not been threatened or promised anything in exchange for giving this statement and that he is giving this statement freely and voluntarily because it is the truth. Rufus states this that he has a pending drug charge, but no promises, deals have been made to him on that case or any other case in order to give this statement. Rufus states that he has be allowed to use the bathroom whenever he needed to. He has had cheese burgers to eat, water and soda to drink, and has had cigarettes to smoke. Rufus states that he is not under the influence of any drugs or alcohol. Rufus states that he has been treated fairly well by the police and excellent by the state's attorney. Rufus states that he can read and write English and demonstrated this by reading a loud this entire handwritten statement while the state's attorney and detective followed along. Rufus states that he was offered to make any changes, corrections or additions to the statement that he wanted, and he had nothing further to add."

The State's witness, Margaret Ogarek, an assistant state's attorney, testified· that she presented Rufus Johnson to the grand jury on May 21, 2004. Just prior to the grand jury, she interviewed him for approximately a half-hour, and his answers were consistent with the statement which she had been provided, and which she then showed to Johnson. At trial, the grand jury transcript was admitted into evidence and published

to the jury. (R. III, 137-41).

. III: Defendant's Statements

Robert Garza, a Chicago police detective testified that on December 4, 2003 he was aware of the murder of Brandon Baity. (R. III, 30). He called Anthony Johnson and told Anthony that he had heard that Anthony had information about a murder which happened on 69th and Emerald. Anthony said he would contact Garza, but did not. (R. III, 32). Later that day, Garza picked up Anthony at 70th and Eggleston and took him to Area 1. (R. III, 33).

Detective James Las Cola, another Chicago police detective testified that he interviewed Anthony Johnson at Area 1. (R. III, 38-39). At the time of trial, Las Cola had been a Chicago police officer for 39 years and a detective for 29 and one half years. (R. III, 37). Together with a detective Anderson, Las Colas began questioning Anthony at 1 a.m. on the morning of December 5. (R. III, 40).

Anthony Johnson told Las Colas a man named Nolan picked him up in a car on 72d and Union (R. III, 42-43), and that Anthony then drove the car to 70th and Eggleston where he picked a man named Clayton (R. III, 43). As Anthony was driving eastbound on 71st street, Clayton told Anthony to follow a cream colored car. Anthony followed the cream colored car to Emerald and 69th street, where it stopped at a curb. (R. III, 44).

Anthony told Las Colas that he pulled up alongside and a little bit to the front of the cream-colored car; that two people came off a porch and spoke to the driver of the cream-colored car; that Clayton exited their car · and walked to the passenger side of the· other car and began shooting (R. III, 45); that the cream-colored car then went forward, and hit their car , and then struck another car that was parked in the street (R. III, 45-46); that Anthony then pulled up and called out to Clayton to "come at me";

that Clayton ran to their car; that while Clayton was running, he was still shooting back at the cream-colored car (R. III, 46) ; that after Clayton reentered their car, Anthony drove to 70th Street and Eggleston Avenue, where he dropped off Clayton; that before Clayton left the car, Clayton stated that the victim had crawled out of his vehicle, as their vehicle was turning the corner; that Anthony then drove to an alley in the area of 71st Street between Vincennes and Lafayette Avenues. (R. III, 47). Detective Las Colas testified that, after this interview, he placed Anthony Johnson under arrest. (R. III, 51-52).

On cross-examination, Detective Las Colas admitted that Anthony never told Las Colas that Anthony knew that Sims had a gun or was looking for Brandon Baity. (R. III, 50).

Detective Winstead testified that on December 5, 2003, he met Anthony Johnson, who had come in the night before and was in custody. (R. III, 89-90). After giving Anthony Miranda warnings, Winstead went to the area where the shooting had taken place to look for witnesses, without success. (R. III, 91).

At 2:30 in the afternoon, Winstead returned to Area 1 and started to interrogate Anthony. (R. III, 92).

Detective Winstead testified that Anthony Johnson told Winstead: that on September 30, 2003, he had a gray Grand Am which belonged to Rufus Johnson that Johnson had lost the keys, which defendant then found; that Johnson said it was okay for defendant to drive the vehicle (R. III, 93); that later that evening he was driving around with Nolan Swain and they were talking to girls (R. III, 94-95); that at 70th Street and Eggleston Avenue, they picked up Clayton Sims, a marijuana dealer who entered the back seat; that Sims told Anthony Johnson that he was out of marijuana (R. III, 95); that

Anthony planned to drive Sims home and to drop Swain off at the "el," since Swain lived in Maywood; that they saw a cream-colored Mercury; that Sims said to make a U-turn and follow that vehicle because Sims wanted to "holler at the guy," that defendant made a U-tum and followed the cream-colored car to 69th Street and Emerald Avenue (R. III, 96) that as soon as the cream-colored car pulled over, the driver began talking to two men who came from a nearby building; that defendant pulled his vehicle a little bit in front of the cream-colored car; that defendant "hollered to one of the guys if they had any weed for sale"; that the man responded no; that Sims exited the back of their vehicle; that Sims approached the passenger side of the Mercury and started shooting with a "Mac 10" (R. III, 97-98); that the driver of the cream-colored car drove forward, hit the rear door of the Grand Am, and then hit some other vehicles; that Anthony Johnson drove down the street five or six car lengths; that defendant yelled to Sims "hurry up before I leave you" (R. III, 98); that Clayton Sims started running back towards the Grand Am but that he was still firing into the cream-colored car (R. III, 99), that after Sims entered the back seat, defendant drove off; that after Sims reentered the vehicle, Sims told Anthony Johnson; said: 'Brandon shot me'"; that Sims also stated that Baity was trying to crawl out of his car (R. III, 100); that Anthony dropped Sims off at the comer of 70th Street and Eggleston Avenue; that Anthony parked the Grand Am in an alley on 70th and Vincennes (R. III, 99);; that Anthony and Swain walked back to 70th Street and Eggleston Avenue, where Sims still was (R. III, 100); that Sims still had the gun (R. III, 100-01); that Sims called for a taxi (R. III, 101); and that Anthony Johnson stayed the night nearby at the home of a woman that he knew. (R. III, 102).

Detective Winstead further testified that defendant also stated: that defendant

had previously heard both from friends and from Sims that Sims had been shot in September 2003; that Sims said that he had been shot by "B"; that Anthony thought that the man in the cream colored car was not the person he knew as "B," and that when Sims told him to follow the car he thought that Sims was thinking about "carjacking" the car. (R. III, 103).

Detective Winstead testified that, after the interview, he transported defendant to the scene of the shooting, and defendant showed him where defendant had made the U-turn, where he had left the Grand Am in an alley, and where he had spent the night after the shooting. (R. III, 105). Detective Winstead testified that, later that evening, Anthony Johnson was released from the police station. (R. III, 109).

On cross-examination, Detective Winstead admitted that Anthony Johnson did not say that Sims had told him that Sims was looking for Brandon Baity. (R. III, 111). Anthony Johnson did not say that Sims said anything before he got out of the car and started shooting. (R. III, 113).

IV: Clayton Sims

Anthony Johnson did not testify on his own behalf. The only witness called on behalf of the defense was Clayton Sims. (R. IV, 3 – 52).

Sims testified that on the night of October 1, 2003, he saw Anthony Johnson by a car and asked for a ride. (R. IV, 7). Nolan Swain was also in the car. (R. IV, 8).

As Johnson was driving, Sims saw someone he knew, Brandon Baity, also driving in a car. Baity told Anthony to follow Baity's car, so that Sims could buy some weed. (R. IV, 9). Anthony followed Baity's car to 69th and Emerald, a spot where weed was sold. (R. IV, 10).

Sims was carrying a gun on a shoe string tied around his neck inside his hoodie. (R. IV, 10). He did not tell Anthony he was carrying a gun (R. IV, 11) and also did not tell him that he planned to shoot Baity. (R. IV, 10, 12).

Anthony pulled over in front of Baity's parked car. (R. IV, 11-12). Sims jumped out of the car and pulled out his gun, a Mac-11. He wanted to retaliate against Baity for shooting Sims a few weeks before. (R. IV, 12). After Sims starting firing his gun at Baity he saw that Anthony had driven away. (R. IV, 13).

ARGUMENT

I:

THE STATE FAILED TO PROVE ANTHONY JOHNSON ACCOUNTABILITY BEYOND A REASONABLE DOUBT, FOR THE MURDER OF BRANDON BAITY

At his trial, Anthony Johnson was not proved guilty beyond a reasonable doubt. Because he was not, his conviction must be reversed.

It is true that when a court considers a challenge to a criminal conviction based on the sufficiency of the evidence, its function is not to retry the defendant. *People v. Milka*, 211 Ill.2d 150, 178, 810 N.E.2d 33 (2004). The relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Woods*, 214 Ill.2d 455, 470, 828 N.E.2d 247 (2005). Under this standard, a reviewing court must draw all reasonable inferences from the record in favor of the prosecution. *People v. Bush*, 214 Ill.2d 318, 326, 827 N.E.2d 455 (2005). However, a court will of review will overturn the fact finder's verdict if "the proof is so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt." *People v. Schott*, 145 Ill.2d 188, 202-03, 582 N.E.2d 690 (1991).

In this case since there was no evidence that Anthony Johnson personally killed Brandon Baity's the case against him turned on accountability.

In order to establish guilt by accountability the State must prove that the alleged accomplice: (1) intended to help the principal plan or commit the offense, (2) did

some act that helps the principal plan or commit the offense, and (3) both formed the requisite intent and perform the requisite act before or during the commission of the offense itself. See 720 ILCS 5/5–2(c) (West 2010).

As recently stated by this court: "The crucial question in many cases, then, is at what point in time the defendant formed the intent to assist the principal and did a particular act that aided the principal. This makes the duration of the offense itself a key component of any analysis because any act performed or intent formed by the defendant after the offense is complete is irrelevant for the purpose of establishing accountability."

People v. Phillips, 2012 IL App (1st) 101923, ¶ 15.

Phillips is directly on point, and mandates reversal.

In *Phillips*, defendant was charged with aggravated battery with a firearm and aggravated discharge of a firearm on a theory that he was accountable for the actions of his codefendant, Sanders.

The evidence at trial showed that the victims were driving looking for a southbound place to park. As they made a U-turn they suddenly found themselves on a collision course with another vehicle that had also been driving southbound on Homan behind them. The other vehicle, a black Charger, started to turn left onto 21st Street as Lewis executed his U-turn in the intersection. The two vehicles nearly collided but stopped within inches of each other. *Phillips*, at ¶ 4.

Because of the glare from the streetlights on the other vehicle's windshield, the victims were unable to see the occupants of the other vehicle. The two vehicles sat facing each other for about 15 seconds, but no words were exchanged and no one got out of either vehicle. The other vehicle backed up about 10 to 15 feet into the northbound lane of Homan and, as it backed up, the glare came off of its windshield. One of the victims, Lewis recognized the driver as defendant, whom he had grown up with and been acquainted with for several years.

Lewis was now unable to proceed because the other vehicle was in the way. Gresham alerted Lewis that someone was getting out of the back driver's side door of the other vehicle, which was on the side of the Charger facing away from Lewis' vehicle. The person moved around the other vehicle and approached Lewis and Gresham's vehicle. Lewis began to turn the wheel of his vehicle in order to proceed eastbound down 21st Street. As the approaching individual passed under a streetlight, Lewis recognized him as codefendant Sanders, whom he also knew. When Sanders got to within 15 or 25 feet from Lewis' vehicle, he raised a handgun and began firing at the vehicle. Lewis and Gresham ducked down in order to protect themselves but Lewis was hit in the back by a round, breaking two ribs and grazing his lungs. Lewis immediately drove the car away from the scene. Though he collapsed in the entryway upon arrival, he ultimately recovered from his wound. *Phillips*, at ¶ 4, 5. Another witness, a bystander, did not see the face of either the driver or the passenger but did see a man running in the street, shooting a firearm. A car pulled up, and the man got in. *Phillips*, at ¶ 6.

On these facts, nearly identical to those alleged here, this court found that the prosecution had not proved that Phillips was accountable beyond a reasonable doubt. The court noted that the prosecution alleged four facts from which it argued Phillips' participation in a common design could be inferred: Defendant (1) transported the shooter [*i.e.*, Sanders] to the scene of the offense, and then (2) used his vehicle to force the victim to stop driving. When the victim was successfully stopped, (3) defendant repositioned his car so as to cut off all traffic in the victim's lane, trapping him. After co-defendant Sanders had opened fire, (4) defendant proceeded to drive up and allow Sanders to re-enter the vehicle." *Phillips*, at ¶ 14.

This court noted, that under *People v. Dennis*, 181 Ill.2d 87, 89, 692 N.E.2d 325, 327 (1998), accountability cannot be established by acts of an alleged accomplice which occur after all the elements of the principal's crime have occurred and the offense is complete. Since the crime of aggravated battery with a firearm was complete when the victim was wounded, and since the crime of aggravated discharge was complete when the gun was fired, defendant's act of driving the principal away could not, by itself, establish accountability. *Phillips*, at ¶ 20, 21.

The court further found that there was no evidence that Phillips, as the driver of the vehicle, knew that the passenger was armed or that the passenger intended to commit the crimes of aggravated battery with a firearm or aggravated discharge of a firearm. In the absence of evidence that Phillips knew the driver was armed, the state could not establish accountability for the crime charged. *Phillips*, at ¶ 22. Indeed, as the *Phillips* court pointed out, even in cases where the alleged accomplice knew the principal was armed, and drove the principal to the scene and drove away afterwards, accountability

was not established beyond a reasonable doubt. See *People v. Taylor*, 186 Ill. 2d 439, 442, 712 N.E.2d 326 (1999).

The *Phillips* court also rejected the prosecution's contention that accountability could be established by evidence that the defendant had "blocked" or "trapped" the victims' vehicle. The court found that the evidence did not establish "blocking" or "trapping," *Phillips*, at ¶ 24, 25, 26, 27, 28 but that, "even assuming for the sake of argument that defendant *did* intend to forcibly halt the victims' vehicle and block them in, we cannot overlook the insurmountable hurdle that there is no evidence that defendant knew before the shooting that Sanders was armed with a gun." Phillips, at ¶ 30.

Here, there was, similarly not one iota of evidence that Anthony Johnson knew that Sims was armed with a gun before Sims shot and killed Baity. Sims testified that the gun was concealed under his shirt and that he did not tell Johnson he had it. Johnson told the police that he did not know Sims had the gun until after he started shooting. Only one ambiguous statement, the disavowed claim of Rufus Johnson that Anthony said "we" had "busted a move" could possibly suggest that Anthony knew Sims was armed beforehand. That one ambiguous statement is too slender a reed upon which to base proof beyond a reasonable doubt.

Anthony Johnson's conviction must therefore be reversed.

II:

THE TRIAL COURT ERRED BY REFUSING TO INSTRUCT THE JURY THAT FOR PURPOSES OF ACCOUNTABILITY, THE DURATION OF THE COMMISSION OF THE OFFENSE IS DEFINED BY THE ELEMENTS OF THE OFFENSE AND THAT IT IS THE KILLING INVOLVED, NOT THE FLIGHT OR ESCAPE, WHICH CONSTITUTES THE OFFENSE OF FIRST DEGREE MURDER.

During the jury instruction conference, defense counsel tendered two non-pattern jury instructions which accurately stated the principle that Anthony Johnson could not be held accountable for allegedly helping Sims escape after Sims had killed Brandon Baity. (R. IV, 56-58, R. C115). The first instruction read:

"For purposes of accountability, the duration of the commission of the offense is defined by the elements of the offense.

Where killing is used to accomplish either flight or escape, such conduct may properly be viewed as continuing the essential element of the offense of first degree murder.

It is the killing involved, not the flight or escape, which constitutes the offense of first degree murder.

The jury should consider this instruction in conjunction with the accountability instruction previously provided."

The second, alternative instruction read:

"It is the killing and any involvement defendant had in that process which constitutes the offense of first degree murder

The jury should consider this instruction in conjunction with the accountability instruction previously provided."

(R. C115).

These instructions were nearly identical to, and was modeled after, the instruction which this court held should have been given in response to the jury's questions during the first trial. This court stated that the trial court should have told the jury:

"Where killing is used to accomplish either flight or escape, such conduct may properly be viewed as continuing the killing element of the offense of first-degree murder. It is the killing involved, not the flight or the escape, which constitutes the offense of first degree murder . [Citations and brackets omitted].

"The trial court should also add that, the jury should consider the above instruction, in conjunction with the accountability instruction, which the trial court already provided.

"Or instead, the trial court could state more simply that: it is the killing and any involvement defendant had in the process which constitutes the offense of first degree murder."

(R. C78-79).

The trial judge refused the tendered defense instruction. (R. IV, 60-61). The trial judge was wrong.

A trial court has discretion to allow non-IPI instructions which cover subjects that it determines the jury should be instructed upon, and tendering such instructions is proper if they are accurate, simple, brief, impartial, nonargumentative statements of the law. Illinois Supreme Court Rule 451(a). Accord, *People v. Ramey*, 151 Ill.2d 498, 536, 603 N.E.2d 519, 534-35 (1992), In this particular case, where this court had already found that the tendered defense instruction covered a subject the jury should be instructed on, and where this court had already decided that the tendered instruction was

a "simple, brief, impartial, and nonargumentative" statement of the law, the trial judge abused his discretion by refusing the instruction.

Under Illinois law, a person is legally accountable for the conduct of another when: "either *before or during* the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c). (emphasis supplied). Moreover, Illinois law makes clear that "commission of an offense" refers specifically to the elements of the offense. (a "person is responsible for conduct which is an element of an offense if the conduct is either that of the person himself, or that of another and he is legally accountable for such conduct as provided in Section 5-2, or both.").

The standard pattern instruction mirrors the statutory language. as to the phrase "before or during the commission of the offense." See IPI Crim. No. 5.03 (4th ed.), but does not define the phrase "commission of the offense," or state explicitly that the duration of an offense is to be defined with the reference to the offense's elements. Because accountability limits the accomplice's liability to acts committed "before or during" the "commission" of the charged offense, the legal duration of the charged offense is obviously critical. And since current pattern jury instructions do not, in general, define when a charged offense is complete, or otherwise define "commission" of an offense, historically juries have often expressed confusion as to whether they should find a defendant liable for conduct which occurs during escape or flight. This confusion has been particularly salient in cases where the alleged accomplice drives the principal to and from the scene of the crime but does not otherwise participate in the crime itself.

For example, in *People v. Dennis*, 181 Ill.2d 87, 89, 692 N.E.2d 325, 327 (1998), the defendant was charged with the armed robbery of two brothers, which occurred near a dope house. Defendant testified that he drove to the dope house, with the principal, Jones, as his passenger, in order to buy drugs. Defendant dropped Jones off near the dope house. As defendant was waiting, he saw Jones being chased toward the car by an unknown male. Thinking that there had been a "drug bust," defendant let Jones into the car. Only after Jones was in the car did defendant learn that that Jones had just stolen a radio at gunpoint. Defendant dropped Jones off and went home himself. He did not tell the police what had happened until they visited him at his home. He testified that he did not know that Jones had a gun or was planning to commit an armed robbery. 181 Ill. 2d at 87- 92.

During deliberations, the jury sent out notes asking when the "commission of the offense" was "complete," or "over." The court responded that the jury could consider "the period of time and the activities involved in escaping to a place of safety." 181 Ill. at 92. In a case of first impression, the Supreme Court held that the trial court had erred in so instructing the jury because the crime of robbery was complete when force or threat of force causes the victim to part with possession or custody of property against his will. 181 Ill.2d at 103, 692 N.E.2d at 334.

It should be noted that this interpretation of the accountability statute was not intuitively obvious or free from controversy. Citing cases in other jurisdictions, the State in *Dennis* argued strenuously that the "commission of an offense" should include a "related series of continuous events," the concept which is sometimes referred to as "*res gestae*." Under this approach, a defendant would be held accountable for his or her assistance at any point in time during a related series of continuous events which could

be considered part of the res gestae of the offense. *Dennis*, 181 Ill.2d at 97, 692 N.E.2d at 331. Moreover, this point of view was accepted by the trial judge, Michael Toomin, a well respected jurist who later sat on the appellate court. If the *Dennis* principle was not obvious even to learned jurists in this and other jurisdictions, there is no reason to believe that an Illinois jury would accept and apply it without proper instruction.

Moreover, Illinois courts have long recognized that the law of accountability is sufficiently complex and controversial as to require special instruction, both during voir dire and prior to deliberations. For example, it has been held that the law of accountability, like the defense of insanity, is sufficiently controversial so as to permit voir dire of potential jurors as to its principles under Illinois Supreme Court Rule 234. *People v. Davis*, 95 Ill.2d 1, 18, 447 N.E.2d 353, 361 (1983); *People v. Klimawicze*, 352 Ill. App. 3d 13, 26, 815 N.E.2d 760, 773 (1st Dist. 2004); *People v. Mapp*, 283 Ill. App. 3d 979, 989, 670 N.E.2d 852, 859 (1st Dist. 1996); *People v. Johnson*, 276 Ill. App. 3d 656, 658-59, 659 N.E.2d 22, 24 (1st Dist. 1995). And the IPI instructions include not only the standard definition of accountability, IPI Crim. No. 5.03 (4th ed.)but also a special definition of accountability in the context of felony murder, IPI Crim. No. 5.03A, a definition of withdrawal, IPI Crim. No. 5.04 (4th ed.)a statement of the principle that a defendant can be accountable even for the acts of a person who is not legally responsible, IPI Crim. No. 5.05 (4th ed.), and a statement of the principle that a defendant can be accountable even for the acts of a person who has been acquitted or has not yet been tried. IPI Crim. No. 5.06 (4th ed.)

Illinois Pattern Jury Instruction Criminal 5.03A is particularly indicative. This instruction states:

"To sustain the charge of first degree murder, it is not necessary for the State to show

that it was or may have been the original intent of the defendant or one for whose conduct he is legally responsible to kill the deceased, .

It is sufficient if the jury believes from the evidence beyond a reasonable doubt that the defendant and one for whose conduct he is legally responsible combined to do an unlawful act, such as to commit _____ , and that the deceased was killed by one of the parties committing that unlawful act."

IPI Criminal 5.03A was not originally a pattern instruction, but was adopted following the cases of *People v. Ramey*, 151 Ill. 2d 498, 536, 603 N.E.2d 519, 534-35 and *People v. Wade*, 185 Ill. App. 3d 898, 542 N.E.2d 58 (1st Dist. 1989), where trial judges gave similar instructions at the prosecution's request and over defense objection. Following *Ramey*, the IPI Committee adopted 5.03A as a pattern instruction, in order to ensure that the jury would be properly instructed in the principles of the felony murder doctrine. See IPI Criminal 5.03A, Committee Note.

IPI Criminal 5.03A, the felony murder accountability rule, essentially states the converse of the *Dennis* principle. As the court in *Dennis* stated:

"We acknowledge that, at least in the context of felony murder, we have held that if a killing occurs in the course of an escape from a robbery, the escape is within the operation of the felony-murder rule. That rule had its genesis in *People v. Bongiorno*, 358 Ill. 171, 173, 192 N.E. 856 (1934), citing *People v. Boss*, 210 Cal. 245, 290 P. 881 (1930). In *Bongiorno*, this court recognized, as a principle of law, that where two or more persons are engaged in a conspiracy to commit robbery and an officer is murdered while in immediate pursuit of either or both of the offenders who are attempting escape from the scene of the crime with the fruits of the robbery, either in possession of one or both, the crime of robbery is not complete at the time of the murder, inasmuch as the

conspirators had not then won their way, even momentarily, to a place of temporary safety, and the possession of the plunder was nothing more than a scrambling possession. Accord *People v. Golson*, 32 Ill.2d 398, 408, 207 N.E.2d 68 (1965); *People v. Johnson*, 55 Ill.2d 62, 68, 302 N.E.2d 20 (1973); *People v. Hickman*, 59 Ill.2d 89, 94, 319 N.E.2d 511 (1974) (holding that the period of time and activities involved in escaping to place of safety are part of crime itself); *People v. Smallwood*, 102 Ill.2d 190, 80 Ill.Dec. 66, 464 N.E.2d 1049 (1984) (holding that the act of robbery itself has not necessarily been completed at time victim surrenders the property so that no further consequences will attach to robber's conduct subsequent to surrender of property).

"The State does not now seek, and we are not inclined, to extend the felony-murder escape rule to apply in accountability cases. Certain policy considerations inform our decision. Felony murder and accountability have theoretically different underpinnings. Felony murder seeks to deter persons from committing forcible felonies by holding them responsible for murder if a death results. *People v. Viser*, 62 Ill.2d 568, 343 N.E.2d 903 (1975). Because of the extremely violent nature of felony murder, we seek the broadest bounds for the attachment of criminal liability. For that reason, in felony murder, a defendant's liability is not limited to his culpability for commission of the underlying felony. A defendant may be found guilty of felony murder regardless of a lack either of intent to commit murder (see *People v. Moore*, 95 Ill.2d 404, 69 Ill.Dec. 640, 447 N.E.2d 1327 (1983)), or even connivance with a codefendant (see *People v. Burke*, 85 Ill.App.3d 939, 41 Ill.Dec. 230, 407 N.E.2d 728 (1980)). Our continued adherence to a proximate cause approach is further exemplary of how broadly we seek to extend the reaches of criminal liability in the case of felony murder. See *People v. Lowery*, 178

Ill.2d 462, 227 Ill.Dec. 491, 687 N.E.2d 973 (1997); see also *Hickman,* 59 Ill.2d 89, 319 N.E.2d 511.

"Unlike felony murder, accountability focuses on the degree of culpability of the offender and seeks to deter persons from intentionally aiding or encouraging the commission of offenses. Holding a defendant who neither intends to participate in the commission of an offense nor has knowledge that an offense has been committed accountable does not serve the rule's deterrent effect. Further, the attachment of liability in such situations contravenes general concepts of criminal culpability. The felony-murder escape rule contemplates neither knowledge nor intent. Thus, the rule is irreconcilable with our accountability statute and we decline to apply it in that context. See *In re D.C.*, 259 Ill. App. 3d 637, 197 Ill.Dec. 661, 631 N.E.2d 883 (1994), *overruled in part, People v. Taylor,* 287 Ill.App.3d 254, 222 Ill.Dec. 746, 678 N.E.2d 358 (1997) (holding that felony-murder escape rule does not apply for purposes of accountability); accord *Cooper,* 53 Cal.3d 1158, 811 P.2d 742, 282 Cal.Rptr. 450; but see *Trammell,* 71 Ill.App.3d 60, 27 Ill.Dec. 315, 389 N.E.2d 1 (applying felony-murder escape rule outside context of felony murder).

Dennis, 181 Ill.2d at 103, 692 N.E.2d at 334-35.

If juries should be routinely instructed that a defendant who is accountable for a felony is responsible for a murder committed during the escape from the felony under the felony murder rule, it makes no sense to refrain from instructing juries that in a non felony murder case, a defendant may not be held accountable for aiding a codefendant's escape from an already completed crime.

This conclusion is reinforced by the fact that, in other jurisdictions, juries are routinely instructed as to when the commission of the underlying offense is complete. See *People v. Cooper*, 53 Cal.3d 1158, 1170, 811 P.2d 742, 751, 282 Cal.Rptr. 450, 459 (1991)(holding that jury was improperly instructed that accessory liability for robbery included actions during "escape" from robbery but holding that "[i]n the future, courts should instruct that for purposes of determining liability as an aider and abettor to robbery, the commission of the crime of robbery is not confined to a fixed place or a limited period of time and continues so long as the stolen property is being carried away to a place of temporary safety"); cited with approval in *Dennis,* 181 Ill. 2d at 98; *State v. Whitaker,* 200 N.J. 444, 465-66, 983 A.2d 181, 194 (2009)(trial court should have instructed jury sua sponte that defendant could not be guilty of robbery and murder based upon aiding the principal to conceal murder).

Instruction in this case was particularly vital because both prosecutors argued in summation that Anthony Johnson could be accountable for Clayton Sims' actions merely because he drove Sims to the scene of the murder and allegedly drove him away. In opening statement, prosecutor McCarthy argued: "The law of legal responsibility dissuades people from helping each other commit crimes. *** You can't just say all I did was drive him there and drive him away. The law of legal responsibility doesn't allow that." (R. IV, 80). She further argued that the jury could conclude that Anthony Johnson was accountable because of what he allegedly did after the shooting:

"Ladies and gentlemen, you can consider what the defendant did after, after the crime to conclude that he knew what was going to happen before the crime. You can look at his actions after the murder because they show you he knew what Clayton Sims was going to do before the murder. It's like someone saying I killed in self defense and

yet what do they do after they kill, bury the body, take the victim's credit cards, go on a spending spree. Self defense, not so much. His actions after the murder tell you he knowingly helped Clayton Sims because look what he does. Think about it. If he had no idea what Clayton Sims was going to do when he drove down Emerald, then when Clayton Sims started shooting, he would have been shocked, oh, my God, I had no idea this was going to happen. This is horrendous. He would have driven away, he would have called 911. He would have gone to the police. I had no idea, oh, my God. He doesn't do any of those things. He's not surprised. He is not surprised when Clayton got out of car and shot because he knew that was what he was going to do. Instead what does he do? He calmly pulls his car up a few car lengths when Brandon hits his car trying to get away, waits for Brandon -- waits for Clayton, calls out to Clayton, come on before I leave you. Clayton still shooting gets in the car, he drives Clayton away. He drops him off, he ditches the car cause he knows it's hot, and then he meet up with Clayton Sims again. Doesn't disassociate himself. Doesn't go home, pack a bag leave town, oh my God, what happened? No, he drives away with Clayton Sims, drops him off and meets up with him later. Those are not the actions of an innocent person who had no idea a crime was going to take place. Those are the actions of a partner in crime."

(R. IV, 83-85).

Although the prosecutor may have been free to argue that Anthony Johnson's actions after the crime was completed were relevant, in the absence of an appropriate instruction the jury could have interpreted her argument that the jury could convict Anthony Johnson merely because he drove Sims to the scene of the crime and drove him away meant that he could be convicted based solely upon his actions as an accessory after the fact.

Moreover, when defense attorney Brandstrader, in response, attempted to accurately state the *Dennis* principle, attorney McCarthy successfully objected. In his closing argument, Brandstrader said:

"All Anthony knew to do was to pull away. And he told Winstead what his problem was at that point and his fear of Mr. Sims with that MAC-10, and his blood thirstiness for retaliation and revenge. That's after-the-fact. For whatever moral obligation he had, it is after-the-fact. It was not before, it was not during. And that is what is required under the instruction you will get. Leaving that scene in the absence of that knowledge, intent, or plan does not make one accountable. Leaving that scene, even with the knowledge that a crime was committed in the absence of the intent, plan, or design does not make one accountable."

(R. IV, 100-01).

Ms. McCarthy objected, telling the jury that Brandstrader had misstated the law. Instead of overruling this objection, the trial judge told the jury that Brandstrader's statement was "contrary slightly" to the instructions he was going to give the jury. (R. IV, 101). When Mr. Brandstrader repeated this accurate statement of the law (R. IV, 101-02), Ms. McCarthy again objected and the trial judge again failed to overrule the objection. (R. IV, 102).

McCarthy's erroneous arguments and ill-founded objections were compounded during prosecutor Valentini's closing argument. Valentini argued that defendant's argument that he drove Sims away from the crime because he was afraid of Sims was not a "defense," and the trial judge failed to sustain an objection to this argument. (R. IV, 112-13). Valentini's argument strongly implied that defendant could be liable for first degree murder solely because he allegedly drove Sims from the scene, and his fear

of retribution did not shield him from liability. In fact, compulsion is a defense to a charge of accessory after the fact, and attorney Brandstrader should have been free to argue to the jury, as he did, that they should not find Anthony Johnson guilty of murder even if he drove Sims away from the murder scene.

It is the position of the defense that the trial judge erred by failing to give the tendered non-IPI instruction and that this instruction should be given in all cases where the duration of the crime is an issue. But particularly where, as here, the prosecution explicitly argues, over timely objection, that defendant can be found liable just for driving the principal to and from the scene of the charged crime, the tendered instruction was necessary to inform the jury accurately as to the applicable law. Anthony Johnson's conviction must therefore be reversed.

III:

THE TRIAL JUDGE ERRED BY OVERRULING A DEFENSE OBJECTION TO THE QUESTION AS TO WHETHER CLAYTON SIMS LIED TO HIS JURY BY "LETTING" HIS LAWYER TELL THE JURY HE WAS NOT GUILTY.

Anthony Johnson did not take the stand in his own defense and called as his only witness Clayton Sims, the alleged shooter, who had been acquitted of the murder of Brandon Baity. (R. IV, 5-13). Sims testified that he shot Baity (R. IV, 12-13) but that Anthony did not know that Sims was going to shoot Baity (R. IV, 12) or that Sims was armed with Mac-11 (R. IV, 10-11).

In response, the prosecutor launched an attack on Sims which really has to be read to be believed. The prosecutor first asked Sims if he was an "honest." "upstanding guy," (R. IV, 15) who "wants to tell jurors the whole truth," (R. IV, 15-16) and would never "deceive jurors." (R. IV, 16). He further established that Sims would not keep the "whole truth" from jurors because he was an "honest guy." (R. IV, 16).

Having established Sims' supposed character for honesty, the prosecutor then attacked him for pleading not guilty to a first degree murder charge and putting the State to its proof. The prosecutor asked the following questions and received the following answers:

"Q. You were charged in '04, right?

A. Yeah.

Q. And you being the honest guy you are, pled

not guilty, right?

A. Yeah.

Q. Even though you killed Brandon Baity, right?

A. Yeah.

Q. You went to trial, right?

A. Yeah.

Q. You took a jury trial?

A. Yep.

Q. You said earlier you would never do anything to fool jurors, right?

A. No, you said that. I said--

Q. I asked you that and you said no, right?

A. Yeah.

Q. You would never do anything to lie to jurors, right?

A. No, I mean not -- I said not in this situation, no.

Q. You would never do anything to deceive them, right?

A. No, not in this situation.

Q. But you always want them to know the whole truth, right?

A. Yep.

Q. You wouldn't let people lie to them without standing up, would you?

A. Would I let other people lie to them without standing up?

Q. Yeah?

A. In this situation I'm standing up."

(R. IV, 27-28).

After establishing again that Sims was testifying under oath that Anthony was not an accomplice to the murder of Brandon Baity (R. IV, 28), Valentini then moved in for the kill:

"Q. At trial -- you took a jury trial, right?

A. Yes.

Q. 2007, right, and you being the guy that would never deceive jurors, your defense at that trial was, I didn't do it, right?

A. Yeah. I didn't get on no stand or nothing. It was y'all case."

(R. IV, 29-30).

Over overruled defense objection, prosecutor Valentini then asked: "You had your lawyer stand up in front of a jury just like this one and say Clayton Sims didn't shoot Brandon Baity, isn't that right?" (R. IV, 30-31). Sims answered in the affirmative (R. IV, 30) and was then further cross-examined as to whether he was "telling the truth" when he allegedly let his own jury believe that he was innocent. (R. IV, 30-32).

Later, prosecutor Valentini administered the coup de grace when he asked Sims whether he had let Brandon Baity's mother "suffer" during her testimony at his trial by not standing up and telling his jury that he had shot Brandon Baity. (R. IV, 32).

Since most of prosecutor Valentini's cross-examination was not objected to, it is addressed in Point IV, below as plain error. However, the trial judge's overruling of the timely defense objection to prosecutor Valentini's question to Sims is preserved error, which also requires reversal.

The general rule is that the silence of a defense witness following an arrest is not admissible as a prior inconsistent statement to impeach his or her testimony at trial. *U.S. v. Hale*, 422 U.S. 171, 174-180, 95 S.Ct. 2133, 2135 - 2138 (1975)(impermissible on evidentiary grounds to impeach a defendant with his post-arrest silence, even in the absence of *Miranda* warnings); *People v. Glass*, 94 Ill. App.3d 69, 72, 418 N.E.2d 454, 457 (1981)(error to allow defense witness to be impeached with post-arrest silence); *People v. Godsey*, 74 Ill.2d 64, 69, 383 N.E.2d 988, 991 (1978)(error to allow defense

witness to be impeached with silence in front of grand jury); *People v. Homes*, 274 Ill. App. 3d 612, 620, 654 N.E.2d 662, 668 (1st Dist. 1995). The reason is that post-arrest silence may be based upon Miranda warnings, attorney advice, or, as in this instance, the witness's exercise of his constitutional right to plead not guilty and put the prosecution to its proof. Such silence is therefore "insolubly ambiguous." *Homes*, 274 Ill.App.3d at 619, 654 N.E.2d at 668.

This may be the first time in the history of Illinois jurisprudence that a defense witness has been cross-examined about his silence at his own trial. But the principles of *Hale*, *Godsey*, *Glass*, and *Homes* apply, and apply with greater force. As the Illinois Supreme Court noted in *Godsey*, impeaching a witness with a prior assertion of a fifth amendment righs will tend to suggest to the jury that the defendant, as well as the witness, has an obligation to speak. 74 Ill.2d at 70, 383 N.E.2d at 991. Since Anthony Johnson did not testify as his own trial, the extensive cross-examination of Sims about how he "deceived" his own jury by remaining silent could not have failed to suggest that Johnson also had an obligation to "tell the truth." And prosecutor Valentini underlined this point by repeatedly arguing to the jury in closing that they should not be deceived by "bogus defenses," and "evidence not revealed" like the Sims jury had been deceived. (R. IV, 114-15).

Anthony Johnson's conviction must therefore be reversed.

IV:

PROSECUTOR VALENTINI COMMITTED PROSECUTORIAL MISCONDUCT BY CROSS-EXAMINING CLAYTON SIMS AS TO WHETHER HE WAS AN "HONEST GUY"; WHETHER HE HAD "DECEIVED" HIS OWN JURY BY PLEADING NOT GUILTY, BY NOT "STANDING UP" AND TELLING THEM HE WAS GUILTY AND BY LETTING HIS LAWYER "STAND UP" AND TELL HIS JURY THAT HE WAS NOT GUILTY; AND THAT HE LET BRANDON BAITY'S MOTHER "SUFFER" DURING HIS TRIAL BY NOT STANDING UP AND TELLING THE JURY THAT HE WAS GUILTY.

As detailed in Point III, prosecutor Valentini launched a devastating attack on Anthony Johnson's only witness, Clayton Sims. To the extent that defense counsel failed to object to this line of questioning, it is reviewable as plain error and requires reversal.

A reviewing court may disregard a defendant's forfeiture and review the issue under the plain-error doctrine to determine whether reversal is required. *People v. Lewis*, 234 Ill.2d 32, 42, 912 N.E.2d 1220, 1226 (2009). The plain-error doctrine allows a reviewing court to consider forfeited error when (1) the evidence is closely balanced or (2) the error is 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. *People v. Walker*, 232 Ill.2d 113, 124, 902 N.E.2d 691, 697 (2009). Under either prong of the plain-error analysis, the defendant has the burden of persuasion. *Lewis*, 234 Ill. 2d at 43, 3 912 N.E.2d at 1227. Before reviewing the issue under the plain-error doctrine, the court must first determine whether any error occurred. *People v. Piatkowski*, 225 Ill.2d 551, 565, 870 N.E.2d 403, 411 (2007). Under this standard, prosecutor Valentini's questions to Sims were erroneous.

First, the prosecutor's questions to Sims about whether he was an "honest" or "upstanding" person who would never deceive a jury were all objectionable. Sims' own

opinion of his general honesty was irrelevant. As Illinois Rule of Evidence, Rule 608 states: "The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." Accord, *People v. Reid*, 272 Ill.App.3d 301, 310, 649 N.E.2d 593, 599-600, 208 (Ill. App. 1st Dist. 1995); *People v. Doll*, 126 Ill. App. 3d 495, 501, 467 N.E.2d 335, 340 (2d Dist. 1984). The defense did introduce, and could not have introduced, evidence of Sims's truthful character, either from his own mouth or by the testimony of other witnesses. The prosecutor's colloquy with the witness about his general truthfulness was therefore inappropriate and prejudicial.

Moreover, character evidence, whether for truthfulness or any other characteristic may only consist of evidence "in the form of opinion or reputation," See Illinois Rule of Evidence, Rule 608, and not specific instances. See *People v. Collins*, 2013 IL App (2d) 110915, ¶ 20; *People v. Freeman*, 404 Ill. App. 3d 978, 988, 936 N.E.2d 1110, 1119 (Ill. App. 1 Dist. 2010). Therefore, the cross-examination of Sims as to whether he would ever deceive a jury was improper.

But it was even more improper to cross-examine Sims to establish that he had "lied" to his own jury either by pleading not guilty, by failing to announce his guilt during the course of his trial, or by allowing his lawyer to argue for his innocence. As argued in Point III, above, a witness' post-arrest silence may not be used for impeachment. See *People v. Homes*, 274 Ill. App. 3d 612, 620-21, 654 N.E.2d 662, 66 (1st Dist. 1995). And prosecutor Valentini's repeated references to Sims's prior

assertions of these rights could not have failed to prejudice Anthony Johnson, who had similarly chosen not to testify in his own behalf.

Finally, the suggestion that Sims had "let" Diane Duncan "suffer" by not failing to "stand up and say I shot Brandon Baity" during his own trial was also plain error. It is well settled that a prosecutor may not urge a jury to convict in order to give solace to the surviving family of a murder victim. *People v. Blue*, 189 Ill. 2d 99, 129-30, 724 N.E.2d 920, 93 (2000). Counsel for Anthony Johnson has been unable to find any Illinois case in which a prosecutor has suggested that a defendant has an obligation to confess in open court in order to provide closure for the surviving family of a murder victim; perhaps because no Illinois prosecutor has yet been so brazen. But this comment was also plain error. On extremely similar evidence, this court has already found that the case was closely balanced and that the plain error doctrine applies.

Therefore, Anthony Johnson's conviction should be reversed.

V:

THE PROSECUTORS DEPRIVED ANTHONY JOHNSON OF A FAIR TRIAL BY ARGUING THAT THE JURORS NEEDED TO CONVICT ANTHONY JOHNSON TO PREVENT PEOPLE FROM "MAKING MOCKERY OF THE CRIMINAL JUSTICE SYSTEM," THAT IF ANTHONY JOHNSON WAS ACQUITTED "YOU MIGHT AS WELL LEGALIZE DRIVE BY SHOOTINGS IN THIS TOWN" THAT IF THE JURY IN CLAYTON SIMS CASE WERE PRESENT AT ANTHONY JOHNSON'S TRIAL THEY WOULD BE "SICK TO THEIR STOMACH" AND THAT SINCE CLAYTON SIMS HAD ALREADY "DUPED" ONE JURY USING "LIES", 'BOGUS DEFENSES," AND "EVIDENCE NOT REVEALED," "LET'S NOT MAKE THAT A TREND."

Throughout their closing arguments, both prosecutors urged the jury to convict based not upon the law and the evidence but upon the emotional arguments that an acquittal would make a "mockery" of the criminal justice system, would "legalize" drive by shootings and would create a "trend" towards verdicts based upon "lies" and "bogus" defenses such as those which had supposedly prevailed during the trial which ended in the acquittal of Clayton Sims. As to the first of these remarks the trial judge overruled a timely defense objection, as to the second no objection was made, and as to the last series of remarks, the trial judge sustained timely objections but the prosecutor continued with the same line of argument even after the objections had been sustained. The closing arguments of the prosecutors were highly improper, the judge's initial ruling was erroneous, and the curative effect of the trial's judge's later proper rulings was vitiated by the prosecutor's continuation of his argument after the objections had been sustained. Moreover, to the extent that one remark, the comment about "legalizing" drive by shootings was not the subject of a timely objection, it should be considered as plain error. Therefore, Anthony Johnson's conviction must be reversed.

In her opening closing argument, prosecutor McCarthy told the jury:

"Ladies and gentlemen, we are a nation of laws. We elect legislators to go to our state house and our state senate and our federal house and our federal senate to enact and to repeal laws. And those laws are our greatest defense against anarchy and chaos. But we need something in addition to the enactment of those laws. We need citizens like yourself to uphold those laws. We need citizens like yourself who are going to say, we're not going to let people come into this courtroom and make mockery of the criminal justice system. We need citizens who will come together and say we are not going to let the defendant help someone ***

(R. IV, 87-88). Defense counsel objected. The court overruled the objection. The prosecutor then said: "We are not going to let the defendant help someone commit cold-blooded murder and get away with it." (R. IV, 88).

The same theme was continued, and underlined, during prosecutor Valentini's rebuttal closing argument. Without objection, he argued that if the allegations as to Anthony Johnson's actions did not demonstrate intent, "then nothing ever will, and you might as well legalize drive by shootings in this town." (R. IV, 112). And he ended his argument by urging the jury to convict not based upon the law and facts, but as redress for the prior acquittal of Clayton Sims:

"If the jury in Clayton Sims' case had at their disposal, Clayton Sims telling them he shot Brandon Baity -- well if they were here this morning, it would make them sick to their stomach to the verdict they reached in that case."

(R. IV, 114). Although defense counsel's objection to this argument was sustained, prosecutor Valentini continued along the same lines, telling the jury: "Because that verdict was a mistake. It was based on a bogus defense and lies and evidence being not revealed." When defense counsel again objected, saying that there was "no evidence" of

"that" in "this case," the trial judge again sustained the objection. (R. IV, 114). Despite this second sustained objection, Valentini made precisely the same argument *again*, stating "Clayton Sims already duped one jury, let's not make that a trend." (R. IV, 114-15).

While courts allow prosecutors great latitude in making closing arguments, *People v. Cisewski*, 118 Ill.2d 163, 175, 514 N.E.2d 970 (1987) and the prosecutor may comment on the evidence and all reasonable inferences from the evidence, *People v. Pasch*, 152 Ill.2d 133, 184, 604 N.E.2d 294 (1992), argument that serves no purpose but to inflame the jury constitutes error. *People v. Blue*, 189 Ill.2d 99, 127-28, 724 N.E.2d 920, 93 (2000).

The most recent cases of this court and the Illinois Supreme Court establish that prosecutorial argument which invites the jury to "send a message" that crime in general will not be tolerated serves no purpose but to inflame the jury. As the Illinois Supreme Court has stated:

"To the extent that the concept of general deterrence is employed in our criminal justice system, it is generally associated with punishment and imposition of sentence. The broader problems of crime in society should not be the focus of a jury considering the guilt or innocence of an individual defendant, lest the remediation of society's problems distract jurors from the awesome responsibility with which they are charged. "At least in theory, it should be obvious that any conviction ought to be summarily overturned if it turned out the jurors thought their verdict was supposed to be a referendum on whether their state ought to surrender to some heinous crime, or whether they should convict in order to 'send a message' that the crimes charged 'will not be tolerated in this state.' " J. Duane, *What Message Are We Sending to Criminal Jurors*

When We Ask Them to "Send a Message" With Their Verdict?, 22 Am. J.Crim. L. 565, 569 (1995).

People v. Johnson, 208 Ill.2d 53, 77, 803 N.E.2d 405, 419-420 (2003).

Therefore, prosecutors should refrain from argument which would "'divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.'" *People v. Fluker*, 318 Ill. App. 3d 193, 202, 742 N.E.2d 799, 806 (1st Dist. 2000), quoting *People v. Martin*, 29 Ill. App. 3d 825, 829, 331 N.E.2d 311 (1975).

The court in *Johnson* did say that prosecutors could continue to make "limited" exhortations about "sending a message" where it was clear that they were telling the jury that their ability to effect general and specific deterrence depended "solely upon its careful consideration of the specific facts and issues before it." *Johnson*, 208 Ill.2d 53, 79, 803 N.E.2d 405, 420 (2003). However, where the prosecutor "blurs that distinction by an extended and general denunciation of society's ills and, in effect, challenges the jury to 'send a message' by its verdict, he does more than urge 'the fearless administration of justice,' he interjects matters that have no real bearing upon the case at hand, and he seeks to incite the jury to act out of undifferentiated passion and outrage, rather than reason and deliberation." 208 Ill.2d at 79, 803 N.E.2d at 420. And this court has specifically condemned argument which tells the jury that an acquittal would allow the defendant to make a mockery of the criminal justice system. *Fluker*, 318 Ill. App. 3d at 203, 742 N.E.2d at 806.

Prosecutor McCarthy's argument that a not guilty verdict would allow people to

come into court and "make a mockery" of the system, particularly following her extended comments on the state and federal legislatures was therefore highly improper, and the trial court erred by overruling a timely objection to this argument. And since, as this court has already determined, the evidence as to Anthony Johnson's accountability was closely balanced, this error was not harmless beyond a reasonable doubt.

Similarly, prosecutor Valentini's remark that, if the state's evidence was not held sufficient to prove guilt, "you might as well legalize drive by shootings in this town," constituted an impermissible prediction as to the consequences of the jury's verdict. Similar comments have long been condemned. See *People v. Fletcher*, 156 Ill. App. 3d 405, 411, 509 N.E.2d 625, 629, 108 (1st Dist. 1987) (prosecutor argued despite sustained objection that an acquittal would (1) mean that "a seven year old's testimony can never convict a defendant," and (2) "encourage potential sex offenders to abuse families"). This remark also requires reversal.

A reviewing court may disregard a defendant's forfeiture and review the issue under the plain-error doctrine to determine whether reversal is required. *People v. Lewis*, 234 Ill.2d 32, 42, 912 N.E.2d 1220, 1226 (2009). The plain-error doctrine allows a reviewing court to consider forfeited error when (1) the evidence is closely balanced or (2) the error is 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. *People v. Walker*, 232 Ill.2d 113, 124, 902 N.E.2d 691, 697 (2009). Under either prong of the plain-error analysis, the defendant has the burden of persuasion. *Lewis*, 234 Ill. 2d at 43, 3 912 N.E.2d at 1227. Before reviewing the issue under the plain-error doctrine, the court must first determine whether any error occurred. *People v. Piatkowski*, 225 Ill.2d 551, 565, 870 N.E.2d 403, 411 (2007).

In this case the error is plain. On extremely similar evidence, this court has already found that the case was closely balanced and that the plain error doctrine applies Therefore to the extent that this error is not preserved, this court should nevertheless find the error to be plain, and reverse.

But the capstone of the prosecutors' efforts to divert the jury from the actual issues in the case came when prosecutor Valentini urged the jury to consider the hypothetical reaction of the Sims jury had they heard Sims testify to his commission of the murder, his statement that the Sims' acquittal was the product of "lies," "bogus defenses," and "evidence not revealed" and his final exhortation of the jury not to make the supposed deception of the Sims jury into a "trend." Valentini, in no uncertain terms, was urging the Johnson jury to convict in order to redress the supposedly wrongful acquittal of Sims, a matter which was wholly irrelevant to the issues at hand. And by telling the jury that Sims had won his acquittal by concealing evidence, particularly following his extensive cross-examination of Sims on his failure to take the stand, Valentini was implicitly commenting on Anthony Johnson's failure to take the stand in his trial. Thus, as the trial judge recognized, these remarks were improper.

This error was not cured by the trial's act in sustaining the defense objections. TThe prosecutor's persistence in making the improper remarks eliminated the salutary effect of the trial judge's sustaining of the defense objections. *People v. Weinstein,* 135 Ill.2d 467, 471, 220 N.E.2d 432, 434 (1966). "The fact that the court sustained objections to the prejudicial statements did not cure the errors in the case. [Citations.] Driving a nail into a board and then pulling the nail out does not remove the hole." *People v. Brown*, 113 Ill.App.3d 625, 629, 447 N.E.2d 1011, 1014 (1983), quoting *People v. Cepek*, 357 Ill. 560, 570, 192 N.E. 573, 578 (1934).

For all of the reasons given, Anthony Johnson's conviction must therefore be reversed.

VI:

PROSECUTOR VALENTINI DEPRIVED ANTHONY JOHNSON OF A FAIR TRIAL BY ARGUING THAT ANTHONY JOHNSON'S EXPLANATION TO THE POLICE THAT HE DROVE CLAYTON SIMS AWAY FROM THE COMPLETED MURDER BECAUSE HE WAS AFRAID OF HIM WAS "NOT A DEFENSE" AND THAT IT THIS "DEFENSE" DID NOT "WORK FOR THE NAZIS AT NUREMBERG

During his closing argument, defense attorney Brandstrader stated:

"All Anthony knew to do was to pull away. And he told Winstead what his problem was at that point and his fear of Mr. Sims with that MAC-10, and his blood thirstiness for retaliation and revenge. That's after-the-fact. For whatever moral obligation he had, it is after-the-fact. It was not before, it was not during. And that is what is required under the instruction you will get. Leaving that scene in the absence of that knowledge, intent, or plan does not make one accountable. Leaving that scene, even with the knowledge that a crime was committed in the absence of the intent, plan, or design does not make one accountable."

(R. IV, 100-01). In other words, attorney Brandstrader, fearing that the jury would convict Anthony Johnson solely based upon his "immoral" action of driving Sims away from the scene of the completed murder, sought to explain Anthony's actions as driven by fear of Sims, whom he had just seen kill Brian Baity and who he now knew was armed with an assault weapon. Attorney Brandstrader's argument was fair comment upon the evidence which had been introduced and was a permissible attempt to persuade the jury to decide the case based upon the law and the facts rather than passion and prejudice.

However, in response, prosecutor Valentini argued that Anthony Johnson's fear

of Sims was not a defense to murder and compared Anthony Johnson to a Nazi tried at Nuremberg:

"The defendant says, well even if you believe he drove him away, he might have been afraid and that's why he did it. Well, there's no credible evidence of that to begin with; number 1. Number 2, that's not a defense. Committing first degree murder out of fear of your co-offenders is first degree murder. Being afraid of retribution by your co-offenders is not a defense. That defense didn't work for the Nazis in Nuremberg and it doesn't work for Anthony Johnson today either." (R. IV, 112-13).

Defense counsel objected, but the trial court failed to sustain the objection and instead simply instructed the jury to listen to the evidence and read the instructions. (R. IV, 113).

The prosecutor's remark was extremely prejudicial, and that prejudice was compounded by the trial court's failure to sustain defense counsel's timely objection.

First, apart from anything else, the reference to Nazis and to Nuremberg, and the explicit comparison of Anthony Johnson's defense to the defense raised by such figures as Herman Goering, Rudolf Hess, and Joachim von Ribbentrop was a blatant appeal to passion and prejudice.

While courts allow prosecutors great latitude in making closing arguments, *People v. Cisewski*, 118 Ill.2d 163, 175, 514 N.E.2d 970 (1987) and the prosecutor may comment on the evidence and all reasonable inferences from the evidence, *People v. Pasch*, 152 Ill.2d 133, 184, 604 N.E.2d 294 (1992), argument that serves no purpose but to inflame the jury constitutes error. *People v. Blue*, 189 Ill.2d 99, 127-28, 724 N.E.2d 920, 93 (2000). Even statements based upon the evidence may be error if they are not

relevant to guilt or innocence and could only have been used to inflame the jury's passions and prejudice them against the defendant. *People v. Tiller*, 94 Ill. 2d 303, 321, 447 N.E.2d 174 (1982).

In *Tiller*, the States Attorney characterized the three charged murders as a "holocaust" similar to the Nazi holocaust depicted in a television show broadcast the night before closing arguments were made. The court found that these remarks, even though based upon the evidence, constituted error, although not reversible because the overwhelming evidence of guilt. 94 Ill. 2d at 303.

The reference to Nuremberg and, impliedly to the famous war criminals tried there was also extremely prejudicial. It has been held that is also error for the prosecution to make reference in closing argument to notorious cases and criminals, such as John Wayne Gacy. See *People v. Barnes*, 107 Ill.App.3d 262, 268, 437 N.E.2d 848 (1st Dist. 1982)(error for prosecutor to use "image of a mass murderer whose case was fresh in the public mind" when he said that Gacy's mother would have testified for him as a character witness).

The reference was also prejudicial because it invited the jury to consider not Illinois law, but international law as applied by the Nuremberg tribunal, law which has no relationship to the charges here. And, apart from this confusing and prejudicial reference, the prosecutor was also misstating the law. It is true that compulsion is not a defense to murder, but it is a defense to all other felonies, including the felony of acting as an accessory after the fact. The defense attorney was stating, accurately, that Anthony Johnson's alleged act of driving Sims away from the murder scene could have been explained by his fear of Sims' violence rather than by a prior intent to aid Sims' in committing the charged murder. Although the prosecutor was free to argue an alternative

explanation of Anthony's actions, he was not free to confuse and mislead the jury with an irrelevant reference to a defense which had not been raised or argued.

Anthony Johnson's conviction should therefore be reversed.

VII:

PROSECUTOR VALENTINI DEPRIVED ANTHONY JOHNSON OF A FAIR TRIAL BY TELLING THE JURY THAT THERE WAS "NO BYSTANDERS THAT WE KNOW OF THAT CAN TELL US ANYTHING USEFUL IN THIS CASE" AND THE TRIAL COURT ERRED BY OVERRULING A TIMELY OBJECTION TO THIS MISSTATEMENT

During his rebuttal closing argument, prosecutor Valenti argued as follows: "Because there's only three kinds of people at murder scenes; there's victims, there's bystanders, and there's criminals. Brandon Baity is the victim in this case. There's no bystanders that we know of that can tell us anything useful."

Defense counsel Brandstrader promptly objected to this statement. The trial court failed to sustain the objection and simply told the jury that "this is argument." The prosecutor's remarks were improper, and the trial court erred by failing to sustain the objection. (R. IV, 108).

As this court is well aware, the prosecutor, as the representative of the State of Illinois, stands in a special relation to the jury and must choose his words carefully so that she does not place the authority of her office behind the credibility of his witnesses. *People v. Roach*, 213 Ill. App.3d 119, 124 (1991). Moreover, it is improper for a prosecutor to allude to his personal knowledge of evidence which has not been introduced. See *People v. Barnes*, 07 Ill.App.3d 262, 268, 437 N.E.2d 848, 852 (1st Dist. 1982)(prosecutor replied to defendant's argument that there was no physical evidence by telling the jury: "Counsel knows all the evidence in the apartment. He knows what we had. We would wish we could show it to you").

The prosecutor's statement that there were "no bystanders" who could say anything "useful," was, as he was well aware, false. During Anthony Johnson's first trial a bystander and eyewitness, Alexander Weatherspoon testified. Far from saying nothing

"useful" he testified that he saw the car drive away but did not see Clayton Sims re-enter the car, just as Clayton Sims testified.

The prosecutor was free not to call Alexander Weatherspoon. The prosecutor was not free to tell the jury that Alexander Weatherspoon did not exist. By telling the jury that "we" -- i.e. the prosecution -- did not know of any bystander witnesses the prosecutor vouched for the strength of his case and, moreover, vouched falsely.

This error, when combined with the trial judge's action in failing to sustain defense counsel's objection, deprived Anthony Johnson of a fair trial. Anthony Johnson's conviction must be reversed.

VIII:

DEFENDANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO CALL ALEXANDER WEATHERSPOON AS A WITNESS

At trial, defense called only one witness, Clayton Sims, who testified that Anthony Johnson did not know that Sims was going to shoot Brandon Baity and that Johnson did not drive Sims away from the murder scene. Sims was severely attacked as an admitted murderer and because of his numerous felony convictions. However, defense counsel failed to call a second witness, Alexander Weatherspoon, an unimpeached independent bystander who would have testified that the shooter did not get into a car after the murder. Weatherspoon, who testified as the prosecution's witness in the first trial, was not called as a witness in the second trial. By failing to call Weatherspoon as a witness, attorney Brandstrader deprived Anthony Johnson of the effective assistance of counsel.

To establish a claim of ineffective assistance of counsel, a defendant must show both a deficiency in counsel's performance and prejudice resulting from the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance may be shown by demonstrating that counsel's performance fell below an objective standard of reasonableness, and prejudice will only be found where there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *People v. Wheeler*, 401 Ill.App.3d 304, 312-313, 929 N.E.2d 99, 10 (3d Dist. 2010). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698; *People v. Mims*, 2010 WL 3339277, 5 (Ill. App.

1st Dist. 2010).

At the first trial, Weatherspoon testified in critical part as follows. He witnessed car pull up before the shooting (S.R. LL-78-79), saw the shooting (S.R. LL-84-87), and saw the shooter standing over Baity's body. (S.R. LL-90). He did not, however, see the car that had pulled up just before the shooting. Nor did he see the shooter re-enter a car. (S.R. LL-132-33).

Weatherspoon's testimony corroborated Sims' testimony that after the shooting he walked away and never re-entered the car driven by Anthony Johnson. No strategic reason supported Brandstrader's failure to call Weatherspoon.

Brandstrader's failure to call this witness was extremely prejudicial. This was a close case on the issue of accountability and Weatherspoon, who had no axe to grind and did not know Anthony Johnson was obviously a more credible witness than Sims, the admitted murderer. Moreover, Brandstrader's failure to call the witness allowed prosecutor Valentini to argue that there were no "bystanders" to tell the jury what happened.

Anthony Johnson's conviction must therefore be reversed.

IX:

THE TRIAL JUDGE ACTED VINDICTIVELY BY SENTENCING ANTHONY JOHNSON TO 17 ADDITIONAL YEARS FOLLOWING HIS RETRIAL BASED SOLELY ON A SINGLE PRISON INCIDENT

After originally being convicted of first degree murder, Anthony Johnson, a 17 year old with no prior criminal record was sentenced to 30 years imprisonment. Following his retrial, the trial judge resentenced Johnson to an additional 17 years based on an single prison incident involving an alleged assault which was never criminally charged. This sentence was vindictive, excessive and violated Anthony Johnson's constitutional protection against double jeopardy.

In *North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), the Supreme Court limited the power of a sentencing court to increase a sentence after a reconviction following a new trial. *Pearce*, 395 U.S. at 725-26, 89 S.Ct. at 2080-81, 23 L.Ed.2d at 669-70. The Supreme Court held that under the due process clause of the fourteenth amendment, an increased sentence imposed after a retrial gives rise to a presumption that the greater sentence has been imposed for a vindictive purpose, *i.e.,* that the court is punishing the defendant for invoking his constitutional rights. *Pearce,* 395 U.S. at 724-25, 89 S.Ct. at 2080, 23 L.Ed.2d at 668-69. See *Alabama v. Smith,* 490 U.S. 794, 799, 109 S.Ct. 2201, 104 L.Ed.2d 865, 872 (1989). Accord, *People v. Baze,* 43 Ill.2d 298, 253 N.E.2d 392 (1969). See also 730 ILCS 5/5-5-4 (West 1996).

In this particular case, the vast increase in the sentence gives rise to a heightened presumption of vindictiveness. Anthony Johnson was originally sentenced to 30 years, 10 years more than the minimum or 50% over the minimum. His new sentence increased

his term of incarceration by 17 years, an increase of more than 50% over his original sentence and nearly double the statutory minimum. In other words, for an alleged assault in prison, Anthony Johnson received just three years less than he could have received for participation in a murder. And the trial judge assessed this sentence despite acknowledging the substantial mitigation in the case. This is vindictiveness, on steroids.

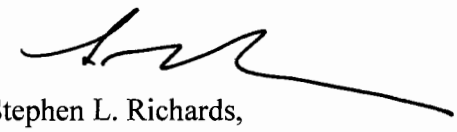
It should be noted that the case cited by the prosecution in support of an increased sentence, *People v. Taylor*, 288 Ill. App. d 21, 30, 679 N.E.2d 847, 853-54 (2d Dist. 1997) hardly supports the huge increase in sentence. In *Taylor*, the defendant, who had originally been sentenced to 30 years for aggravated criminal sexual assault received an additional five years in prison for assaultive behavior, not 17.

This court should therefore remand for resentencing or in the alternative, reduce the defendant's sentence to a reasonable term.

CONCLUSION

For the reasons given in Points I, this court should reverse Anthony Johnson's conviction. For the reasons given in Points and remand for a new suppression hearing. For the reasons given in Points II – V, this court should reverse and remand for a new trial. For the reasons given in Point VI, this court should reverse and remand for a new sentencing hearing or should reduce Anthony Johnson's sentence to 20 years.

Respectfully submitted,



Stephen L. Richards,

COUNSEL FOR DEFENDANT-APPELLANT

APPENDIX

JUDGMENT APPEALED FROM

IN THE CIRCUIT COURT OF COOK COUNTY

PEOPLE OF THE STATE OF ILLINOIS)
V.)
ANTHONY JOHNSON)
Defendant

CASE NUMBER 04CR1560002
DATE OF BIRTH 09/25/86
DATE OF ARREST 06/01/04
IR NUMBER 1436456 SID NUMBER 047727180

ORDER OF COMMITMENT AND SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

The above named defendant having been adjudged guilty of the offense(s) enumerated below is hereby sentenced to the Illinois Department of Corrections as follows:

Count	Statutory Citation	Offense	Sentence	Class
001	720-5/9-1(a)(1)	MURDER/INTENT TO KILL/INJURE	YRS. 047 MOS.00	M
	and said sentence shall run concurrent with count(s) 002 ___ ___ ___			
002	720-5/9-1(a)(2)	MURDER/STRONG PROB KILL/INJURE	YRS. 047 MOS.00	M
	and said sentence shall run concurrent with count(s) 001 ___ ___ ___			
____	_____	_____	YRS. ____ MOS. ____	____
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:			
____	_____	_____	YRS. ____ MOS. ____	____
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:			
____	_____	_____	YRS. ____ MOS. ____	____
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:			

On Count ___ defendant having been convicted of a class _ offense is sentenced as a class x offender pursuant TO 730 ILCS 5/5-5-3(C)(8).

On Count ___ defendant is sentenced to an extended term pursuant to 730 ILCS 5/5-8-2.

The Court finds that the defendant is entitled to receive credit for time actually served in custody for a total credit of 2891 days as of the date of this order

IT IS FURTHER ORDERED that the above sentence(s) be concurrent with the sentence imposed in case number(s) _____
AND: consecutive to the sentence imposed under case number(s)
_____ _____ _____ _____ _____

IT IS FURTHER ORDERED THAT STAY OF MITT 7-30-12_____
_____
_____

IT IS FURTHER ORDERED that the Clerk provide the Sheriff of Cook County with a copy of this Order and that the Sheriff take the defendant into custody and deliver him/her to the Illinois Department of Corrections and that the Department take him/her into custody and confine him/her in a manner provided by law until the above sentence is fulfilled.

ENTERED
JUDGE ARTHUR F. HILL, JR. 1871

DATED JULY 26, 2012 ENTER: 07/JULY/26 2012

DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

CERTIFIED BY G DANIELS
DEPUTY CLERK

JUDGE HILL, ARTHUR F JR 1871

GCP9 07/26/12 10:19:19

CCG N305

C00364

NOTICE OF APPEAL

No. 1-12-2459

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- ANTHONY JOHNSON, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County, Illinois 04 CR 15600 Honorable Arthur F. Hill, Jr., Judge Presiding.

CERTIFICATE OF COMPLIANCE

I, Stephen L. Richards, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing 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 70 pages. This court has granted defendant's motion to file an overlength brief not to exceed 70 pages.

Stephen L. Richards
651 W. Washington Suite 205
Chicago, IL 60661

IN THE CIRCUIT COURT OF COOK COUNTY

COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, -vs- ANTHONY JOHNSON	))))))))	02 Circuit Court No.04-CR-15600 Honorable Arthur Hill, Judge Presiding

NOTICE OF APPEAL

An appeal is taken from the Order of judgment described below:

Court to which appeal is taken: Appellate Court of Illinois, First District

Appellant's Name: ANTHONY JOHNSON

Appellant's Attorney: STEPHEN L. RICHARDS
651 w. Washington, Suite 205
Chicago, IL 60661
773-817-6927

FILED
TIME AM PM
AUG 01 2012
Dorothy Brown
Clerk of the Circuit Court
Criminal Division
Deputy Clerk Signature

Offenses of which convicted: First Degree Murder

Date of Judgment or order: July 25, 2012

Sentence: 47 years IDOC

Nature of order appealed from: Judgment of conviction and sentence

STEPHEN L. RICHARDS

C00365

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