No. 128687

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- CLAYTON T. MARCUM, Defendant-Appellant.	Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-20-0656. There on appeal from the Circuit Court of the Eleventh Judicial Circuit, Ford County, Illinois, No. 20-CF-53. Honorable Matthew J. Fitton, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ARGUMENT

I.

Clayton Marcum's statutory right to a speedy trial was violated where the State was allowed to bring new and additional aggravated-domestic-battery charges that were subject to compulsory joinder with the initial aggravated-battery charge and were filed outside the applicable 120-day term. The appellate court reversibly erred when it refused to review that violation for plain error under Illinois Supreme Court Rule 615(a).

In his opening brief, Clayton Marcum ("Marcum") first asserted that his statutory right to a speedy trial was violated where the prosecutor, despite knowing all the necessary facts of his case, delayed for nearly 9 months to charge him with the new and additional aggravated-domestic-battery charges–charges that were subject to compulsory joinder with the initial aggravated-battery charge. (Opening Brief, p. 13-14, 16-25.) Marcum contended that the prosecutor's belated filing of the aggravated-domestic-battery charges occurred well outside the applicable 120-day term, violating his right to a speedy trial. (Opening Brief, p. 13-14, 16-25.) On appeal, Marcum sought relief for this violation under the second prong of the plain-error doctrine, which permits the reviewing court to examine unpreserved errors that are so serious that they affect the proceeding's fairness. (Opening Brief, p. 13-14, 25-33.)

While the State disagrees with awarding Marcum any relief, it does not contest that the prosecutor failed to bring the aggravated-domestic-battery charges within the applicable 120-day term. (Response Brief, p. 30-54.) In fact, the State concurs with the appellate court's conclusion that Marcum was denied his statutory right to a speedy trial. (Response Brief, p. 44, citing *People v. Marcum*, 2022 IL App (4th) 200656-U, ¶¶ 38-44.) As such, the State offers no defense for the prosecutor's conduct in delaying nearly 9 months to charge Marcum with these new and additional aggravated-domestic-battery charges, all the while he was languishing in county jail and preparing for a single charge of aggravated battery. (Response Brief, p. 44.)

Nevertheless, the State objects to the application of the second prong of the plain-error doctrine and asks that this Court affirm the appellate court's decision to deny any relief on Marcum's speedy-trial argument. (Response Brief, p. 31, 54.) Distilled to its essence, the State posits that, because Marcum raised his speedy-trial argument for the first time on appeal, it was (1) waived, and (2) not amenable to second-prong plain-error review even if the claim was only forfeited. (Response Brief, p. 30-31.) In this process, the State requires that this Court overrule multiple appellate court decisions that have used the second-prong plain error to review speedy-trial violations. (Response Brief, p. 42-43, 50-51.) The State is wrong.

In arguing that Marcum's claim was waived, the State theorizes that *People v. Pearson*, 88 Ill. 2d 210 (1981), controls the outcome here, establishes that his unpreserved speedy-trial argument was waived rather than forfeited, and forecloses plain-error review. (Response Brief, p. 31-33.) The State's assertion overlooks that the *Pearson* defendant never raised any doctrine that would excuse his failure to preserve his argument for appellate review. *Pearson*, 88 Ill. 2d at 218-19. Consequently, this Court was never asked to resolve whether the plain-error doctrine overcomes the defendant's failure to timely raise a speedy-trial argument in a proper motion before the circuit court. *Id.* And, as waiver and forfeiture have been used "interchangeably" by courts, see *People v. Sophanavong*, 2020 IL 124337, ¶ 20, the *Pearson* court's discussion on the defendant's failure to preserve his speedy-trial claim does not establish that it was waived rather than forfeited in the plain-error context, as that doctrine was not before this Court and so any distinction between waiver and forfeiture was immaterial to the ultimate resolution of the defendant's appeal. *Pearson*, 88 Ill. 2d at 218-19; cf. *People v. Corrie*, 294 Ill. App. 3d 496, 506 (4th Dist. 1998) (noting that, in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), Justice Scalia commented on the United States Supreme Court's use of the term "waive" instead of "forfeit" and that "our cases have so often used them interchangeably that it may be too late to introduce precision"). Similarly, the State's citation of other state

court opinions to support its interpretation of *Pearson* is likewise unhelpful; those courts were not tasked with determining whether the defendant's failure to raise his speedy-trial argument within the parameters outlined by statute could be forgiven due a functional equivalent to this state's plain-error doctrine. (Response Brief, p. 34.)

The State also proposes that a balance of the factors are in favor of requiring defendants to assert denials of their statutory rights before the circuit court. (Response Brief, p. 34-36.) To that end, 725 ILCS 5/114-1(a), (b) does place the burden on the defendant to raise in a written motion prior to trial that he was denied his statutory right to a speedy trial; Marcum does not dispute that, pursuant to that statute, he was obligated to present his speedy-trial argument in a written motion and that his oral complaint to the circuit court did not satisfy the statutory requirements. (R. 11-13.) See 725 ILCS 5/114-1(a), (b). Nevertheless, as Marcum's argument is centered on the consequences of that failure, the potential benefits and consequences of placing the burden on the defendant to assert speedy-trial violations are not at issue.

Even so, Marcum notes that several of the State's concerns are unfounded in the context of plain-error review. For instance, the State's worry that allowing defendants to belatedly raise speedy-trial challenges would result in gamesmanship makes little sense; if a defendant is entitled to discharge of his case, there is no incentive to waiting months or even years later–often while incarcerated–to plead with the appellate court to use its discretion to apply plain error to his specific case. (Response Brief, p. 36.) See *People v. Clark*, 2016 IL 118845, ¶ 42 (explaining that the remedial application of the plain error doctrine is discretionary). Similarly, the State's point that the burden should be on the defense to establish speedy-trial errors would not be altered by raising a speedy-trial argument for the first time on appeal, as the defendant already bears the burden to establish plain error. (Response Brief, p. 35.) See *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Nor is the State's apprehension that it would be precluded from challenging an improper discharge any more reasonable; any plain-error claim that the defendant's

speedy-trial rights were violated would be subject to appellate review after full briefing by the parties. (Response Brief, p. 36.) Finally, while there is understandably some reluctance to overturn and moot jury trials, the fact that an argument was not preserved for appellate review does not preclude plain-error relief when necessary for the protection of a defendant's substantial rights. See *People v. Walker*, 232 Ill. 2d 113, 131 (2009). Essentially, the societal cost in negating a jury trial is not the only consideration in whether a court should award appellate relief.

The State also contends that the legislature expressly stated the consequences–waiver–for the defendant's failure to include a speedy-trial argument in a written motion prior to trial. (Response Brief, p. 38-39, 41.) But it does not necessarily follow that the legislature desired to prevent plain-error review. See *People v. Jones*, 211 Ill. 2d 140, 145 (2004) (explaining that "[t]his court has long recognized that we may, in appropriate cases, reach issues notwithstanding their waiver, and we may assume that the legislature understood this fact when it enacted [the waiver provision of the Post-Conviction Hearing Act]"). To that point, the legislature, in enacting 725 ILCS 5/114-1(b), did not expressly preclude a defendant from obtaining appellate relief if he failed to abide by the statutory requirements, even though it knew how to do so. See 725 ILCS 5/114-1(b); see, e.g., *People v. Richardson*, 196 Ill. 2d 225, 229 (2001) (noting that the legislature specifically inhibited the court from vacating a conviction or providing a ground for appellate relief in a criminal case for any violation of the Rights of Crime Victims and Witnesses Act). The failure to particularly bar appellate review is important when the legislature is presumed to know that appellate courts may reach issues notwithstanding any waiver. See *Jones*, 211 Ill. 2d at 145. But even if 725 ILCS 5/114-1(b) can be read as attempting to prevent appellate review as a result of failing to file a pretrial discharge motion, this Court may nonetheless review an unpreserved claim under Rule 615(a) no matter the limitations imposed by the legislature. See *id*; *People v. Mayfield*, 2023 IL 128092, ¶ 31 (explaining that the Illinois Supreme Court Rules prevail over contrary statutory provisions).

And Marcum's conduct–belatedly raising his speedy-trial arguments in writing even though he orally complained to the circuit court about permitting the State to file the new charges–was more consistent with asserting his right in a deficient manner rather than relinquishing a known right. See *People v. Hughes*, 2015 IL 117242, ¶ 37 (articulating that "waiver is the voluntary relinquishment of a known right" whereas forfeiture is "the failure to timely comply with procedural requirements"). Indeed, a failed attempt to present a claim in the required manner at the specified time is precisely the sort of claim traditionally addressed through the plain-error doctrine. The entire purpose of plain-error review is to mitigate the drastic punishment of refusing to examine a meritorious argument solely due to the defendant's inability to bring the matter to the circuit court's attention in the procedurally right way. See *People v. Moon*, 2022 IL 125959, ¶ 20 (explaining that the plain-error doctrine originated due to the court's concern that rejecting to review claims was too harsh of a sanction where the defendant failed to raise an error before the circuit court).

The State turns to federal decisions interpreting whether the federal plain-error doctrine may excuse a statutory violation of the federal right to a speedy trial. (Response Brief, p. 37-38.) However, this Court has rejected adopting the federal plain-error doctrine when asked to do so. See *People v. Herron*, 215 Ill. 2d 167, 186 (2005). Consequently, the federal cases recited by the State do not establish that Marcum cannot seek plain-error relief for the violation of his right to a speedy trial, pursuant to 725 ILCS 5/103-5(a). Even so, the State's response omits that federal courts are not unanimous on this issue. See *United States v. Carrasco*, 257 F.3d 1045, 1050 (9th Cir. 2001) (reviewing for plain-error the defendant's claim that the government violated the Speedy Trial Act even though he never filed a motion to dismiss on the ground relied upon on appeal). Under the entirety of the circumstances, Marcum's failure to timely assert his speedy-trial argument in a written motion does not prohibit him from seeking plain-error relief on appeal.

Even if Marcum's speedy-trial claim is forfeited, however, the State further theorizes that it does not constitute second-prong plain error. (Response Brief, p. 44-52.) In that process, the State opines that a defendant raising second-prong plain error must show that the error is structural and that Marcum fails to identify a deprivation of the statutory right to a speedy trial as structural error. (Response Brief, p. 49-50.) The State's argument, however, disregards that a defendant seeking second-prong plain-error relief need not demonstrate that the error was identified as structural. *People v. Jackson*, 2022 IL 127256, ¶ 30; see *People v. Owens*, 2022 IL App (3d) 190151, ¶ 33 (opining that a defendant need not necessarily allege or prove structural error to obtain reversal for second-prong plain error).

While this Court has equated second-prong plain error with structural error, it has not limited itself to the list of structural errors delineated by the United States Supreme Court. *Moon*, 2022 IL 125959, ¶ 30; *People v. Glasper*, 234 Ill. 2d 173, 199-200 (2009) (recognizing that this Court is "free to determine" that an error is "so severe that reversal is required, regardless of whether the error would be deemed structural under federal law"). As such, there is no burden on the defendant to establish that the at-issue error is on the short list of federally recognized structural errors to qualify as second-prong plain error. See *Moon*, 2022 IL 125959, ¶ 30; see, e.g., *People v. Williams*, 2022 IL 126918, ¶ 56 (for instance, suggesting that even a prosecutor's argument can constitute second-prong plain error, albeit rarely, if it undermines basic protections afforded to criminal defendants). To reiterate, the defendant need only demonstrate that the complained-of error is tantamount to those errors previously identified as structural. See *Moon*, 2022 IL 125959, ¶ 30.

And so the State's complaint that Marcum improperly labeled the denial of his statutory right to a speedy trial as the denial of substantial right–rather than specifically as a structural error–is misplaced. (Response Brief, p. 49-50.) To be sure, this Court has even defined the

test for second prong-plain error as an error "so serious that the defendant was denied a substantial right, and thus a fair trial." *Herron*, 215 Ill. 2d at 179; see, e.g., *People v. Stewart*, 2022 IL 126116, ¶ 12 (opining that the imposition of an unauthorized sentence "affects defendant's substantial rights" and so is amenable to second-prong plain-error review); cf. *Thompson*, 238 Ill. 2d at 614-15 (rejecting that noncompliance with Illinois Supreme Court Rule 431(b) can be reviewed as second-prong plain error because "[a] violation of Rule 431(b) does not implicate a fundamental right"). Even Rule 615(a)'s plain language authorizes appellate review of "[p]lain errors *** affecting substantial rights" though they were not preserved before the circuit court. Ill. S. Ct. R. 615(a).

That being said, it is clear the denial of a substantial right amounts to structural error; the rights to counsel, self-representation, an unbiased judge, a public trial, an unbiased grand jury, and a jury properly instructed on reasonable doubt are all such substantial rights that violations of those rights are recognized as structural errors. *Jackson*, 2022 IL 127256, ¶ 29. In this way, the proceedings before the circuit court violated Marcum's substantial rights and undermined the fairness of the proceeding against him, which is tantamount to structural error at any rate. See *id.* at ¶ 31(offering that it was tasked, in determining whether second-prong plain-error relief was warranted, to determine whether the error was of such importance that it undermined the framework within which the trial proceeds rather than a mere error in the trial process itself).

To be sure, the error that occurred in Marcum's case was not just a trial error, but went to the framework of the trial process. While his liberty was restrained, Marcum prepared for trial on a single count of aggravated battery, even objecting to the State's efforts to extend the speedy-trial term for that charge. (Sup. C. 4-6; Sup. R. 59.) After needless delay–over 9 months after the initial charges were filed–the State brought new and additional aggravated-

domestic-battery charges and forced Marcum to endure further delay or proceeding to trial unprepared, undermining the fairness of the trial process. (C. 9-11; Sup. C. 4-6.)

Contrary to the State's insinuations (Response Brief, p. 46, 48, 51), the improper timing of a defendant's trial can undermine the trial's fairness and constitute second-prong plain error. For instance, in *People v. Walker*, 232 Ill. 2d 113 (2009), this Court examined for plain error whether the circuit court abused its discretion in denying the defendant's motion for a pretrial continuance, where the defense was not prepared for trial. 232 Ill. 2d at 123-24. In that process, this Court found that the circuit court failed to consider any of the relevant factors in denying the defendant's request and did not undertake its obligation to make an informed, deliberation on the motion. *Id.* at 126. Although the error was not properly preserved, this Court continued: "[w]e further hold that the trial court's error was so serious as to affect the fairness of defendant's trial and challenged the integrity of the judicial process[.]" *Id.* at 130. Thus, the improper setting of a defendant's trial, especially where it forced him to trial unprepared, is amenable to second-prong plain-error analysis, as it undermines the trial's fairness. See *id.*

Indeed, concerning the timing of the defendant's trial, the constitutional right to a speedy trial can be reviewed as second-prong plain error and be tantamount to structural error as well. See *Nelson v. Quarterman*, 472 F.3d 287, 334 n.15 (5th Cir. 2006) (Dennis, J., concurring) (recognizing that many commentators have pointed to the right of a speedy trial as essentially being treated as structural by federal courts); see, e.g., *United States v. Oriedo*, 498 F.3d 593, 596 n.2 (7th Cir. 2007) (suggesting that, while the right to a speedy trial is ill-suited to rigid forfeiture rules, there are instances when it can nonetheless be reviewed for plain error); cf. *People v. Nichols*, 60 Ill. App. 3d 919, 923, 925 (3d Dist. 1978) (deciding that the constitutional right to a speedy trial was "fundamental to our system of justice" and so its violation warranted plain-error relief). But the constitutional right to a speedy trial is not like other constitutional

rights. See *Barker v. Wingo*, 407 U.S. 514, 519 (1972). One critical and problematic difference is that the right to a speedy trial "is a more vague concept than other procedural rights." *Wingo*, 407 U.S. at 521. Due to that imprecise nature, the legislature enacted the speedy-trial provisions at issue to implement and carry out the constitutional guarantee to a speedy trial. *People v. Crane*, 195 Ill. 2d 42, 48 (2001). So although the statutory right to a speedy trial is not coextensive with the constitutional right, it is tied more closely to, and provides the required structure for, that constitutional right, in comparison to the other prophylactic, statutory or rule provisions cited by the State that are designed to enforce constitutional rights. (Response Brief, p. 46-48.)

As a result, it is unsurprising that appellate courts *have* concluded that the statutory right to a speedy trial is a substantial, fundamental right and the violation thereof can be remedied through the plain-error doctrine. See *People v. Mosley*, 2016 IL App (5th) 130223, ¶ 9; *People v. Smith*, 2016 IL App (3d) 140235, ¶¶ 10, 21; *People v. McKinney*, 2011 IL App (1st) 100317, ¶ 29; *People v. Gay*, 376 Ill. App. 3d 796, 799 (4th Dist. 2007). Nevertheless, the State complains that these the appellate court decisions should not be followed. (Response Brief, p. 42-43, 49-51.) Taking *Gay* for instance, the State offers that the appellate court improperly cited to the constitutional right to a speedy trial when it concluded that the defendant's statutory right to a speedy trial was a fundamental, substantial right. (Response Brief, p. 42, 50.) Again, although the constitutional and statutory rights to a speedy trial are not the same, implicit in the *Gay* court's reasoning are that both provisions constitute fundamental and substantial rights that are inherent to preserving the fairness of the proceedings. *Gay*, 376 Ill. App. 3d at 799; see *Mosley*, 2016 IL App (5th) 130223, ¶ 9; *Smith*, 2016 IL App (3d) 140235, ¶¶ 10, 21; *McKinney*, 2011 IL App (1st) 100317, ¶ 29. And, as State clearly recognizes, it is a "well-established principle that Illinois's plain error rule allows a reviewing court to reach a forfeited error affecting *substantial rights*." (Response Brief, p. 43, emphasis added, internal quotations omitted.)

In its response, the State also posits that, to establish second-prong plain error, the defendant must show that the harm caused by the error is not quantifiable. (Response Brief, p. 48-49.) But even when determining whether an error is structural and not subject to harmless-error review, the ascertainable nature of the error's harm is not a required rationale for finding that an error is structural. See *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017) (explaining that "[t]he precise reason why a particular error is not amenable to [harmless-error] analysis–and thus the precise reason why the Court has deemed it structural–varies in a significant way from error to error"). And while prejudice is a factor in determining whether the constitutional right to a speedy trial was violated and some courts analyze the prejudicial nature of non-constitutional violations, it is only one of the reviewed factors and it is not required in every case. See *United States v. Taylor*, 487 U.S. 326, 341 (1988) (noting that the absence of prejudice is not dispositive to whether relief is warranted).

Just as importantly, the State is simply wrong on its speculation about the ease at which prejudice can be established; while it is easy to identify the harm caused by lengthy delays, it is rather difficult to measure the precise impact of speedy-trial deprivations on the fairness of a later trial or on the defendant while waiting for trial. Cf. *Walker*, 232 Ill. 2d at 130 (presuming prejudice rather than attempting to suss out the harm resulting from the circuit court's improper denial of the defendant's continuance motion). So while prejudice is a factor that courts can consider, it does not necessarily follow that it is readily identifiable in every case.

In the end, there is no dispute that Marcum's statutory right to a speedy trial was violated in the proceedings before the circuit court. As that violation of his statutory right to a speedy trial is amenable to second-prong plain-error review, this Court should excuse Marcum's failure to properly preserve his argument for appeal and ultimately vacate his convictions and sentences. Marcum further relies on the arguments presented in his opening brief.

II.

Clayton Marcum's constitutional right to counsel was violated where he did not knowingly waive his right to counsel when the circuit court failed to substantially comply with Illinois Supreme Court Rule 401(a). The appellate court reversibly erred when it concluded that the circuit court's admonishments did not prejudice Marcum.

In his opening brief, Marcum also raised that he did not knowingly waive his constitutional right to counsel where the circuit court's admonishments failed to substantially comply with Illinois Supreme Court Rule 401(a). (Opening Brief, p. 34-35, 37-41.) In that argument, Marcum criticized the circuit court's failure to properly admonish him on the correct sentencing possibilities for his offenses and emphasized his confusion over the very nature of the charges, which resulted from the circuit court's differing and misleading instructions at each proceeding. (Opening Brief, p. 34, 37-39.) As the circuit court's fundamentally flawed admonishments led Marcum astray on important considerations in deciding whether to proceed *pro se*, he was prejudiced by the circuit court's noncompliance with Rule 401(a). (Opening Brief, p. 41-45.) Finally, Marcum asserted that, even if his waiver of counsel was effective as to his trial, the changing circumstances of his specific case prevented applying his pretrial waiver to sentencing. (Opening Brief, p. 44-45.) In the end, Marcum asked for a new trial with the assistance of counsel or the effective and knowing waiver of that right; alternatively, Marcum requested a new sentencing hearing with the assistance of sentencing counsel or an effective waiver of sentencing counsel. (Opening Brief, p. 35, 45.)

The State disagrees. (Response Brief, p. 22-30.) First, the State opines that Marcum's waiver of counsel was voluntary, as the circuit court's admonishments, albeit not accurate, substantially complied with its obligations under Rule 401(a). (Response Brief, p. 22-28.) Second, the State offers that the continuing waiver rule should apply as there were no changes of circumstance during Marcum's case that would vitate his pretrial waiver of counsel. (Response Brief, p. 28-30.) The State is incorrect on both accounts.

As an initial matter, the State does not argue before this Court that Marcum's waiver-of-counsel argument was forfeited or waived. (Response Brief, p. 22-30.) As the doctrine of forfeiture applies to the State, the State's failure to raise any forfeiture or waiver argument itself forfeits a claim that the defendant did not preserve an issue for appellate review. *People v. Sophanavong*, 2020 IL 124337, ¶21. This Court should review Marcum's claim on its merits.

Concerning the circuit court's compliance with Rule 401(a), the State posits that it is "undisputed" that the circuit court strictly complied with the first and third propositions of that rule, informing Marcum in open court, and ensuring that he understood, both the nature of the charges against him and his right to appointed counsel. (Response Brief, p. 25.) Marcum *does* dispute that position. (Opening Brief, p. 34, 37-39.) As articulated by the State, Rule 401(a)(1) not only requires the circuit court to inform the defendant in open court, but to determine that he actually understands, the nature of the charges against him. (Response Brief, p. 24.) Now, as provided in the opening brief, Marcum asserted that the circuit court's dialogue with him indicated that he did not actually understand the nature of the charges–two separate counts of aggravated domestic battery– levied against him. (Opening Brief, p. 34, 37-39.) As a whole, the proceedings before the circuit court reflect Marcum's difficulties in comprehending the charges, which was impeded by the circuit court's shifting and confusing admonishments on the matter. (Opening Brief, p. 34, 37-39.)

For instance, in the initial proceedings, the circuit court read the information for Count One and listed the numerous potential penalties that Marcum was facing for that charge. (R. 3-5.) Following that lengthy and complex instruction, the circuit court asked if Marcum understood, and Marcum interrupted, confused as to whether the charges were aggravated batteries. (R. 5.) The circuit court, although informing him Count One charged him with aggravated domestic battery, never confirmed with Marcum that he understood that admonishment. (R. 5.) At the

very next hearing, Marcum's confusion continued on the record: "Question so is this *still* aggravated battery with intent at any time to do bodily harm?" (R. 35, emphasis added.) The circuit court responded incorrectly that it was only "a straight domestic battery[.]" (R. 35.)

Marcum's difficulties in comprehending the charges even remained at the start of his jury trial; Marcum again inquired about the charges and if they were "aggravated domestic." (R. 42.) The circuit court's response that the charges were "the same thing" as he was arraigned on previously did little to clarify Marcum's confusion given that the circuit court had most recently admonished him that he was facing only a domestic battery. (R. 35, 42.) Not only that, the circuit court then expressly assured Marcum that the State was only proceeding on one case of aggravated domestic battery; specifically, the circuit court informed him that he would not be sentenced twice. (R. 43.) As a result, the record affirmatively demonstrated that Marcum did not comprehend, much less that the circuit court actually confirmed that he understood, both what he was being charged with and the fact that they were separate charges with different, distinct sentences. The State's contrary assertion that there is no dispute about the circuit court's compliance with the first and third propositions of Rule 401(a) is simply not correct.

As to the second proposition in Rule 401(a), the State concedes that the circuit court did not accurately admonish Marcum. (Response Brief, p. 25-26.) In fact, the State acknowledges that the circuit court's instructions contained "errors" and "missteps." (Response Brief, p. 25-26.) So there is no dispute that the circuit court incorrectly instructed Marcum that he was extended term so he was facing 7 to 14 years in prison on each charge and subject to 4 years to life of mandatory supervised release as well as later informed that he would not receive more than one sentence in his case. (R. 4-6, 43.) Yet the State nonetheless claims that the circuit court substantially complied with its obligations under Rule 401(a)(2). (Response Brief, p. 25-28.)

In that process, the State offers that at least Marcum was informed of the possibility that he would receive 14 years in prison and 4 years of mandatory supervised release. (Response Brief, p. 25-26.) To be sure, the State opines that the mere fact that Marcum was not aware of how that 14 years might be served–two concurrent 14-year terms or two consecutive 7-year terms–was immaterial. (Response Brief, p. 26.) The State's position overlooks that such a distinction *is* a material difference in deciding whether to represent onself and in making a reasonable assessment of the likelihood of different sentencing options. Based on the admonishments provided to Marcum, he would have to be acquitted of both charges to avoid the possibility of a 14-year prison term; in fact, Marcum needed only to be acquitted of one charge to avoid the possibility of a 14-year prison term. Consequently, there was a substantial difference for a person deciding to represent onself, preparing for trial as a *pro se* litigant, and representing onself before the jurors, especially given the possibility of employing count-specific defenses in this case.

To that end, *People v. Reese*, 2017 IL 120011, and *People v. Johnson*, 119 Ill. 2d 131 (1987), are distinguishable. (Response Brief, p. 26-27.) The *Reese* court denied the defendant's assertions that the circuit court failed to fulfill its obligations under Rule 401 when it neglected to admonish him about the possibility that his charges in the present case could run consecutively to a natural-life sentence in an unrelated conviction. *Reese*, 2017 IL 120011, ¶¶ 3-4, 63-64. In that process, the *Reese* court concluded that the circuit court had emphasized to the defendant the potential sentence's gravity in the case he was facing, informing him that he was subjected to over 160 years in prison. *Id.* at ¶¶ 63-64. And, as opposed to here, the *Reese* defendant *was* informed about the possibility of consecutive sentencing between the separate charges in his case and indicated that he "perfectly" understood. *Id.* at ¶¶ 4, 63-64. Unlike here, the circuit court's failure to specifically advise the defendant about the consecutive nature of an unrelated sentence would not prejudice the defendant in any way in deciding to proceed *pro se* based on the available defenses to the different charges then before the court. *Id.*

In a similar fashion, the *Johnson* court rejected the defendant's arguments raising the lack of compliance with Rule 401 where (1) the case involved the death penalty and the admonishment error involved the possible minimum penalty, and the defendant was informed that the minimum penalty nonetheless required imprisonment; and (2) the defendant was repeatedly waiving counsel and then revoking his waiver in an apparent attempt to delay the proceedings. *Johnson*, 119 Ill. 2d at 129-30, 132-34. Not only that, this Court noted that the defendant had standby counsel and was "no stranger" to criminal proceedings. *Id.* at 132-33, 136. None of these reasons for rejecting the *Johnson* defendant's arguments are present here to excuse the circuit court's inaccurate admonishments.

The State also dismisses Marcum's contention that he knew he did not have a prior conviction for residential burglary in Iroquois County, as alleged in the informations, and so may have doubted that he would receive a 14-year prison sentence. (Response Brief, p. 27.) The State's position overlooks that the circuit court's admonishment relayed that the penalty for the offense was 3 to 7 years in prison, but he may receive an extend-term sentence of 7 to 14 years in prison specifically due to that prior residential-burglary conviction. (R. 4-6, 11.) As Marcum knew that he did not have a prior residential-burglary conviction (R. 475) and the circuit court's admonishments which provided both the usual sentencing range as well as the extended-term range based specifically on that non-existent conviction, Marcum's indication that he understood the penalties does not refute his contention that, at least at the time of the waiver, he believed that it was unlikely that he would receive a 14-year prison sentence.

In response, the State additionally speculates that Marcum's reasons for self-representation were unrelated to the possible punishments he was facing, citing *People v. Wright*, 2017 IL 119561, and *People v. Coleman*, 129 Ill. 2d 321 (1989). (Response Brief, p. 27-28.) *Wright* and *Coleman* are distinguishable. In *Wright*, the defendant, who had previously represented himself, had completed legal research, had two years of college, and had experience with the

criminal justice system sought self-representation, repeatedly informing the circuit court that he must do so to protect his right to a speedy trial. 2017 IL 119561, ¶¶ 48, 51, 55. Consequently, this Court on appeal found that the defendant's waiver of counsel was knowingly made and that he was not prejudiced by the circuit court's inaccurate admonishment, as he wanted to represent himself in order to avoid additional continuances and ensure that he received his right to a speedy trial. *Id.*

In *Coleman*, the circuit court informed the defendant, at the time of the waiver, he was facing 20 years to the imposition of the death penalty on the charges, when, in fact, the defendant would be sentenced to natural life if the death penalty was rejected. 129 Ill. 2d at 331-32. However, this Court found that the defendant's wavier of counsel was nonetheless voluntary, as the defendant understood, from arraignment through his trial, that he was facing either a life sentence or the death penalty; he even included that fact in his closing argument. *Id.* at 334-35. More importantly, this Court determined that the defendant expressed valid reasons for wanting to proceed *pro se* that were unrelated to the minimum sentence he could receive. *Id.* at 338. This Court noted that the defendant explained that, if his preferred attorney was not appointed, he wanted to represent himself; he did not want the jurors to believe that he was hiding behind an attorney; and any attorney would lack his personal knowledge of the case. *Id.* at 338-39. Finally, this Court concluded that the defendant tried to use his right to self-representation in order to delay and manipulate the proceedings. *Id.*

But here, Marcum did not express any valid strategy reasons for wanting to appear *pro se* that were independent of any possible sentence, unlike the *Wright* and *Coleman* defendants. (Sup. R. 68.) Instead, Marcum mostly complained about his appointed counsel's abrasive behavior, along with counsel's failure to file a bond-reduction motion and not doing "other" things. (Sup. R. 68.) Given Marcum's reasons for proceeding *pro se*, an accurate admonishment as to the possible penalties he was subject to could influence his decision to represent himself at trial,

especially where Marcum never subsequently filed a bond-reduction motion. (Sup. R. 68.) And, contrary to *Coleman*, there was no allegation that Marcum was attempting to manipulate the system in asking for self-representation and, as opposed to *Wright*, did not have any real degree of legal sophistication.

On this matter, the State also charges that Marcum only provided this Court with a limited record and did not satisfy his burden to include in the record on appeal the pertinent motions that he filed and/or reports of proceedings on those motions. (Response Brief, p. 28.) In so doing, the State fails to articulate what precisely Marcum failed to provide. Concerning the motion directed at counsel, the State specifically asked for Marcum to read it into the record; there is no indication that it was filed. (Sup. C. 5; Sup. R. 68.) As the State directed Marcum to read the motion into the record so it would have "notice," it can hardly complain now that it does not know the contents of that motion. (Sup. R. 68.)

Finally, concerning the application of the continuing waiver rule to Marcum's sentencing hearing, the State argues that its concession during the middle of the trial that Marcum was not extended-term eligible, that he did not have a prior residential-burglary conviction, and that he could serve no more than 7 years in prison was not a material change of circumstance because it resulted in lesser prison exposure than when he insisted on self-representation and that his true maximum penalty remained the same. (Response Brief, p. 29-30.) The State's position overlooks that being told the consequences of his convictions are less severe than initially envisioned may have caused Marcum to persist in self-representation, believing that the stakes were now lower, when he otherwise would have sought the assistance of counsel following the jury's finding of guilt. Just as importantly, the prosecutor's mid-trial concession on Marcum's sentencing range was essentially an amendment of the information that explicitly sought extended-term sentencing (C. 9-11), subjecting him to a different range of penalties.

In its response, the State takes issue with Marcum's representation that the circuit court did not discuss consecutive sentencing with him until the middle of the prosecutor's argument in sentencing. (Response Brief, p. 30.) Although at the start of the sentencing hearing the circuit court did mention that the maximum sentence was 7 years unless discretionary consecutive sentencing was imposed, the circuit court did not specifically address that concept with Marcum, or ensure that he understood the fact that he could receive a 14-year sentence, until the middle of the prosecution's argument. (R. 590, 615, 617-18.) Especially considering the circuit court's previous assurances that he could only receive a single sentence, the court's mere mention that discretionary consecutive sentencing could apply did little to convey to Marcum that he could be forced to serve between 3 to 14 years in prison. (R. 43, 476.) Ultimately, the State's arguments do not call into question that Marcum clearly did not understand, or was prepared to defend against, the possibility that he would face 14 years in prison when he represented himself during the sentencing hearing.

All that aside, Marcum does recognize that, as it stands, the appellate court's decision already orders a new sentencing hearing on his two aggravated-battery convictions, obviating the need for this Court to order a new sentencing hearing on the separate basis of affording Marcum his constitutional right to sentencing counsel or a valid waiver of that right. *People v. Marcum*, 2022 IL App (4th) 200656-U, ¶¶ 69, 77. That being said, Marcum's desire for appellate counsel as well as his repeated assertions on appeal that his waiver of counsel was not valid should prevent the application of the continuing waiver rule on remand. Cf. *People v. Martin*, 2021 IL App (4th) 180267, ¶ 35 (finding that the defendant's pretrial waiver of counsel did not apply for sentencing after the defendant requested posttrial counsel and that the circuit court was required to readmonish the defendant before allowing him to proceed *pro se* to the sentencing hearing). To that end, Marcum asks that this Court order the sentencing court on

remand to readmonish him on his constitutional right to counsel and confirm that he wishes to proceed with counsel prior to a new sentencing hearing.

Ultimately, where the circuit court did not substantially comply with the requirements of Rule 401(a), Marcum's purported waiver of counsel was not effective and he did not knowingly waive his constitutional and fundamental right to counsel. Because Marcum was denied his right to counsel, this Court should reverse and remand for a new trial with the assistance of counsel or the effective and knowing waiver of the right to counsel. See *People v. Bahrs*, 2013 IL App (4th) 110903, ¶ 59. At the very least Marcum asks that this Court remand for a new sentencing hearing with the assistance of sentencing counsel or the effective waiver of such counsel. See *Martin*, 2021 IL App (4th) 180267, ¶ 40. Marcum further relies on the arguments presented in his opening brief.

CONCLUSION

For the foregoing reasons, Clayton Marcum ("Marcum"), defendant-appellant, respectfully requests that this Court vacate his convictions and sentences. Alternatively, Marcum respectfully asks that this Court reverse his convictions and sentences and remand for a new trial with the assistance of counsel or the knowing and voluntary waiver of that fundamental, constitutional right. Marcum also seeks a new sentencing hearing with the assistance of sentencing counsel or the effective waiver of his right to sentencing counsel.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

/s/Edward J. Wittrig
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No. 128687

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- CLAYTON T. MARCUM, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-20-0656. There on appeal from the Circuit Court of the Eleventh Judicial Circuit, Ford County, Illinois, No. 20-CF-53. Honorable Matthew J. Fitton, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On November 8, 2023, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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