

ARGUMENT

I. The Version of Rule 604(d) in Effect on November 26, 2014, Governs Counsel's Certificate.

Illinois's retroactivity analysis is simple and sensible. If a rule or statute states its own temporal reach, the date provided by the rule or statute governs; if not, courts apply section 4 of the Statute on Statutes, 5 ILCS 70/4. *People v. Hunter*, 2017 IL 121306, ¶¶ 20, 22. Here, the rule does not state its own temporal reach. And section 4 provides that once a procedural amendment becomes effective, it governs "proceedings thereafter." 5 ILCS 70/4. In this case, there were no relevant proceedings after the December 2016 amendment, so the amendment does not apply to counsel's certificate. *Id.*; *see also Hunter*, 2017 IL 121306, ¶ 32.

Defendant does not address the Statute on Statutes. Instead, he invites the Court to resurrect its pre-2001 retroactivity jurisprudence, asking first whether the legislature intended the amendment as "a change in policy" or merely "an amendment designed to clarify the intent" of the original rule or statute. *See* Def. Br. 6-11 (relying on *Commonwealth Edison Co. v. Dep't of Local Gov't Affairs*, 85 Ill. 2d 495 (1981), *In re Marriage of Cohn*, 93 Ill. 2d 190 (1982), and *First of Am. Trust Co. v. Armstead*, 171 Ill. 2d 282 (1996)). Under defendant's proposed rule, if the Court determines that an amendment was intended to make a policy change, the *Landgraf* retroactivity analysis governs; but if the amendment was intended as a mere clarification, then it

automatically applies retroactively, even to cases that were no longer pending when the amendment was made. Def. Br. 8.

Defendant's proposed rule contradicts this Court's repeated holdings that section 4 governs unless the amendment *expressly* states its own temporal reach. *See, e.g., Perry v. Dep't of Fin. and Prof'l Regulation*, 2018 IL 122349, ¶ 41 ("[I]f the temporal reach has not been clearly indicated within the text of the new law, then the legislature's intent as to temporal reach is provided by default in section 4." (emphasis added)); *People ex rel. Alvarez v. Howard*, 2016 IL 120729, ¶ 20 ("If the temporal reach of the amendment is not set forth in the statutory amendment itself, then it is provided by default in section 4."); *People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 31 (same); *Caveney v. Bower*, 207 Ill. 2d 82, 94 (2003) (same).

This Court should reaffirm the analysis used in *Perry*, *Howard*, *Einoder*, and *Caveney*, and reject defendant's invitation to add needless confusion to Illinois's retroactivity jurisprudence. *See Perry*, 2018 IL 122349, ¶ 38 ("We begin by detailing Illinois's retroactivity jurisprudence, which parties still appear to be confused by, understandably, given its convoluted and muddled evolution."). Here, none of the recent amendments to Rule 604(d) clearly indicates its own temporal reach. *See Sup. Ct. R. 604(d)* (eff. Dec. 3, 2015); *Sup. Ct. R. 604(d)* (eff. Mar. 8, 2016); *Sup. Ct. R. 604(d)* (eff. July 1, 2017). Thus, section 4 governs, and the November 26, 2014 version of Rule 604(d) applies to counsel's certificate. *See Hunter*, 2017 IL 121306, ¶ 32.

II. By Strictly Complying with the Language of Rule 604(d), Counsel Strictly Complied with Rule 604(d).

Defendant does not dispute that counsel complied with the plain language of Rule 604(d).¹ Def. Br. 1-5. Instead, he argues that this Court effectively rewrote Rule 604(d) in *People v. Tousignant*, 2014 IL 115329, and required counsel to deviate from the rule’s plain language. *Id.* at 1-2.

Not so. The *Tousignant* Court held that the *language* of Rule 604(d) requires counsel to try to ascertain all contentions of error a defendant may have, whether regarding the sentence or the guilty plea, or both. *Tousignant*, 2014 IL 115329, ¶¶ 11-12, 19-23. To be sure, the Court did not adopt the most common meaning of every word in the rule. *See Tousignant*, 2014 IL 115329, ¶ 20 (“[T]o effectuate the intent of Rule 604(d) . . . the word ‘or’ is considered to mean ‘and.’”). But it expressly stated that it was interpreting, not amending Rule 604(d). *Tousignant*, 2014 IL 115329, ¶¶ 11-12, 20 (applying rule of interpretation that “or” is not always disjunctive); *cf. id.*, ¶ 27 (Thomas, J., specially concurring) (“I believe that the rule should be amended to more accurately reflect this court’s intent.”).

In light of *Tousignant*, counsel had notice that she was required to consult with defendant to ascertain any contentions of error, whether regarding the sentence or the guilty plea, or both. Thus, when counsel certified that she consulted with defendant “to ascertain his contentions of

¹ “Rule 604(d),” as used in Section II, refers to the version of Rule 604(d) in effect on November 26, 2014.

error in the imposition of the sentence or the entry of plea of guilty,” C68, she necessarily certified that she had consulted with defendant to ascertain any contentions of error he might have had, whether regarding the sentence or the guilty plea.

Counsel could have used the language of Rule 604(d) to comply with *Tousignant* without reading “or” as “and.” Rule 604(d) can be read to require that, if a defendant has any “contentions of error in the sentence or the entry of the plea of guilty,” counsel must “consult[] with the defendant ... to ascertain” them. This reading comports with both the ordinary meaning of “or” and the purpose of Rule 604(d) as described in *Tousignant*.

Defendant notes that strict compliance with Rule 604(d)’s certification requirement does not assure a court that counsel has complied with the consultation requirement. *See* Def. Br. 3 (“It could be possible, for instance, that defense counsel used ‘or’ in the disjunctive, and only consulted with the defendant about either the guilty plea or the sentence, not both.”). But as Justice Thomas explained in his special concurrence in *Tousignant*, courts would not be expected to reverse and remand based on Rule 604(d) certificates that complied with the certification requirement’s language. *Tousignant*, 2014 IL 115329, ¶ 27 (Thomas, J., specially concurring) (discussing hypothetical “Attorney B,” who truthfully complied with Rule 604(d)’s certification requirement despite failing to comply with the

consultation requirement, and noting that a court would not reverse and remand based on Attorney B's certificate).

Indeed, the rule's later amendment is evidence that counsel could comply with the certification requirement by using its language. It serves as acknowledgement that before the amendment, the Court could "not know with any degree of certainty which attorneys are complying [with the consultation requirement] and which are not." *Id.*

CONCLUSION

This Court should reverse the appellate court's judgment and reinstate the circuit court's judgment.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is five pages.

June 22, 2018

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CERTIFICATE OF FILING AND SERVICE

Under penalty of law as provided in 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct, including that the foregoing **Reply Brief of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and was served by transmitting a copy from my e-mail address to all email addresses of record designated by the persons named below on June 22, 2018.

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Additionally, upon acceptance of the document by the court's electronic filing system, the undersigned will mail an original and twelve copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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