No. 126116

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- DENZAL STEWART, Defendant-Appellee.	)	Appeal from the Appellate Court of Illinois, No. 1-18-0014. There on appeal from the Circuit Court of Cook County, Illinois , No. 16 CR 60199. Honorable Joseph M. Claps, Judge Presiding.

APPELLEE'S REPLY IN SUPPORT OF REQUEST FOR CROSS-RELIEF

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E-FILED
4/22/2022 12:41 PM
CYNTHIA A. GRANT
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APPELLEE'S REPLY IN SUPPORT OF REQUEST FOR CROSS-RELIEF

II. Basing the applicability of the mandatory Class X statute of Section 5-4.5-95(b) on a defendant's age on the date of the conviction rather than the date of the offense violates the proportionate penalties clause of the Illinois constitution, as applied, and the *ex post facto*, due process, and equal protection clauses of the Illinois and United States Constitutions. (Cross-relief requested)

Denzal argued in his request for cross-relief that Section 5-4.5-95(b) is unconstitutional as applied to defendants like him, who were under 21 at the time of the offense, but nonetheless "aged into" mandatory Class X sentencing simply due to the passage of time. (Def. Br. 48-68) Such an application violates the proportionate penalties clause of the Illinois constitution, and the *ex post facto* and due process clauses of the Illinois and United States Constitutions, because it changes the applicable sentencing range after the date of the offense and does not provide fair notice at the time of the offense of the specific sentencing range that would apply to a defendant's conduct. U.S. Const., art. I, §§ 9, 10, amend. XIV; Ill. Const. 1970, art. I, §16, §2. The statute also violates the equal protection clauses of both constitutions because it punishes two equally-situated defendants under the age of 21 differently based solely on the date on which they are convicted of their offenses. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2.The State's arguments in response are without merit and should be rejected.

A. Basing a defendant's eligibility for Class X sentencing on his age at the time of the conviction rather than at the time the offense was committed violates the proportionate penalties clause of the Illinois constitution.

The State, citing *People v. Rizzo*, argues that the "the legislature's decision to allow defendants to age into §95(b) creates the presumption that it does not shock the moral sense of the community." (State Reply 34); 2016 IL 118599, ¶ 37. However, legislative changes are often made only in *response* to judicial

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recognition of progressing societal norms. For example, the Illinois Legislature recently added a provision to the Unified Code of Corrections that mandates the consideration of the defendant's "age, impetuosity, and level of maturity," among other factors, when sentencing juveniles in adult court. See 730 ILCS 5/5–5–4.5–105 (West 2016) (effective January 1, 2016) (incorporating the teaching of *Roper*, *Graham*, and *Miller* into a comprehensive set of additional factors to be considered at sentencing); *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, __ U.S. __, 132 S.Ct. 2455 (2012). See also, *Horsley v. State*, 160 So. 3d 393, 401-05 (Fla. 2015) (analyzing Florida's statutory response to *Miller*, which requires consideration of the signature qualities of youth as mitigating factors); *State v. Riley*, 315 Conn. 637, 655-68, 110 A.3d 1205, 1214-16 (2015) (discussing such legislation in a number of states).

Significantly, the Illinois legislature recently amended §95(b), and the statute now requires that a defendant must be 21 years old at the time of **all** offenses. 730 ILCS 5/5-4.5-95 (West 2021). Indeed, it is presumed that when the legislature amended the mandatory Class X sentencing statute, it acted with knowledge of the prevailing law. See *People v. Hickman*, 163 Ill. 2d 250, 262 (1994) (where statutes are enacted after judicial opinions, we presume the legislature acted with knowledge of the prevailing case law.) As such, the legislature itself has weighed in about the "general moral idea" of allowing a 20-year-old to age into a higher class of punishment. *Rizzo*, 2016 IL 118599, ¶ 37 (fact that legislature has authorized a punishment for a specific crime "says something" about the "general moral ideas of the people."). Moreover, the amended statute now has resolved this constitutional infirmity for future cases involving 20-year-olds, and thus the impact of the unconstitutional version is limited to a small universe of defendants who, like Denzal, aged into mandatory Class X sentencing, but were not eligible for a Class

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X prison sentence at the time of the commission of their offenses.

The State contends that the mandatory Class X sentence does not shock the moral sense of the community based on the facts of the case. (State Reply 30-31) In support, the State cites two cases from the First District Appellate Court finding the sentences in those cases not excessive. (State Reply 31); *People v. Porter*, 2021 IL App (1st) 192467-U; *People v. Cook*, 279 Ill. App. 3d 718 (1st Dist. 1995). As an initial matter, Denzal's claim is not directed at the six-year term of years, but rather to the application of §95(b) in his case that resulted into his aging into a mandatory Class X prison term due solely to the passage of time, over which he had no control. *Porter* did not involve §95(b), and therefore its analysis is not relevant to this issue. *Porter*, 2021 IL App (1st) 192467-U ¶ 26 (defendant sentenced to 10-year extended term sentence). Furthermore, this Court long ago rejected comparative sentencing challenges because they did not "comport with our sentencing scheme's goal of individualized sentencing and would unduly interfere with the sentencing discretion vested in our trial courts." *People v. Fern*, 189 Ill. 2d 48, 55 (1999).

In any event, the facts of the case are not relevant to the constitutional challenge that permits an under-21-year-old defendant to age into a higher class of offense during the pendency of his case, based solely on the passage of time and not on personal culpability. Moreover, the facts of the instant PSMV were non-violent: there were no injuries to any person, and Denzal complied with all police orders during the stop and the arrest. (R. 277-293) Thus, the facts of this non-violent property crime did not warrant a Class X term of years. See, *e.g.*, *People v. Busse*, 2016 IL App (1st) 142941, ¶ ¶ 29, 30, 38 (reducing sentence to minimum, holding that "[t]welve years of imprisonment is grossly disproportionate to the offense of stealing $44 in loose change from a vending machine," stressing that

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factors that "had nothing to do with the small harm caused by [defendant's] actions" triggered Class X sentencing.)

The State cites to this Court's decision in *People v. Smith*, as evidence that permitting a defendant to age into a higher class of offense does not shock the moral sense of the community. 2016 IL 119659, ¶ ¶ 13, 28 (defendant was 19-years-old when he committed offense, 20 when indicted, and 21 when convicted; Court held that defendant's age at the time of conviction controls under the Class X sentencing statute.). But the State agrees that *Smith* did not address the constitutional implications in that decision. (State Reply 26) Denzal asks that this Court now reach the constitutional issues that it declined to address in *Smith* and that have long been intertwined with the statutory interpretation and analysis of §95(b). Indeed, constitutional challenges had been raised in prior appellate court cases addressing §95(b), prior to this Court's ruling in *Smith*. See, e.g., *Smith*, 2016 IL 119659, at ¶¶ 17-27, discussing *People v. Baaree*, 315 Ill. App. 3d 1049 (2000); *People v. Williams*, 358 Ill. App. 3d 363 (2005); *People v. Stokes*, 392 Ill. App. 3d 335 (2009); *People v. Douglas*, 2014 IL App (4th) 120617; *People v. Brown*, 2015 IL App (1st) 140508-B, *petition for leave to appeal denied*, No. 122786 (January 18, 2018). *Smith* would have been the first opportunity for this Court to address the constitutional issues, yet the *Smith* defendant inexplicably failed to present any of these challenges to this Court. Thus, this Court was never asked by the parties to consider or decide the intertwined constitutional challenges to §95(b) that are present in Denzal's case.

The State complains that Denzal "fails to cite a single case" in which delays caused a defendant to age into §95(b). (State Reply 33) Aside from the instant case, in which Denzal aged into a higher class of offense simply because he turned 21-years-old during the pendency of his case, while his attorney was assuring

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him that he would not do exactly that, there is also the case of *People v. Brown*, cited by Denzal in his response brief, and by the State in its reply. 2017 IL App (1st) 140508-B; (Def. Br. 57, 60); (State Reply 38, 43, 47) The State urges this Court to reject Denzal's claim on the basis that no case court has yet held that §95(b) shocks the moral sense of community. (State Reply 35) This argument is tautological. By the State's logic, Denzal is only permitted to challenge the constitutionality of a statute that has already been determined to be unconstitutional by a court. A challenge has to start somewhere and Denzal has done just that.

Notably, other states' criminal statutes utilize the age of defendant at the time of *commission* of the offense, rather than age at time of sentencing and conviction. See. *e.g.*, Alabama Code § 15-19-6 (Youthful Offender Act allows criminal courts to grant youthful offender status to defendants whose crimes or offenses occurred before they turned 21-years-old); Fla. Stat. § 958.04 (courts may sentence defendants as Youthful Offenders if such crime was committed before the defendant turned 21-years-old); Haw. Rev. Stat. § 706-667 ("A young adult defendant is a person convicted of a crime who, at the time of the offense, is less than twenty-two years of age…"); Va. Code § 19.2-311 ("Committed the offense of which convicted before becoming 21 years of age"); New York Consolidated Laws, Criminal Procedure Law - CPL §720.10 ("Youth" means a person charged with a crime alleged to have been committed when he was at least 16- years-old and less than 19- years-old). Although statutes from other states are not subject to the Illinois proportionate penalties clause, the fact that no other state permits a defendant to age into a higher class of offense demonstrates the moral sense of the community and the outlier status of the "aging into" sentencing scheme.

The State is wrong in asserting that "the legislature deci[ded] to allow defendants to age into" a higher class of offense. (State Reply 34) It was not the

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legislature that made that decision, but instead, it was this Court's holding in *Smith*, that age at the time of conviction was the date to determine whether a defendant was subject to mandatory Class X sentencing, an interpretation that permitted defendants who were not yet 21 at the time of their offenses to age into a mandatory Class X prison term. 2016 IL 119659, ¶ 28. As detailed above, the legislature's response was to amend §95(b) to require all offenses be committed after a defendant turns 21, and defendants no longer can age into a higher term of years. This change by the legislature illuminates the moral sense of the community.

Counsel for Denzal told the trial court that Denzal both was and was not eligible for Class X sentencing.
(State's Response is at Arg. III.A.)

The State asserts that Denzal "knew" that he was at risk of aging into §95(b). (State Reply 25-29) However, the record reflects that Denzal was given inconsistent information about whether he was mandatory Class X and that Denzal in fact did not "know" he was at risk of aging into §95(b):

August 2016	20 years old	Denzal arrested for Class 2 PSMV. [1] (C. 15)
December 2016	20 years old	It is established that Denzal is ineligible for any type of probation or TASC, or for boot camp, because of his mental health status. (R. 33-35, 39)
February 2017	20 years old	APD Biel asked for evaluation for TASC, again. (R. 45)
March 2017	20 years old	APD Biel agreed that Denzal is not eligible for TASC, adult Re-Deploy, mental health probation, or drug court. (R. 48-49)

[1]As for the State's characterization of Denzal's "escape" from custody in October 2016 (State Reply 27), the record demonstrates that while Denzal was on electronic monitoring, he missed a court date due to an injury, went to the police to turn himself in, was turned away, and was then charged with escape under case no. 16 CR 1601401. (R. 9-11, 14, 23-24)

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March 2017	20 years old	APD Biel opined to the court that Denzal was not presently Class X mandatory, but would become Class X mandatory on his 21st birthday. (R. 49-50)
May 2017	20 years old	APD Biel said he was wrong about Denzal being Class X mandatory: "[i]t was my belief that based on the law, as of June 1st, when he turned 21 years of age, he would then be X mandatory, Judge. **I do not believe that is the case**. I believe that the X mandatory – the age of when someone is X mandatory is when they are – when the crime is charged." (R. 60)(emphasis added) Denzal rejected the State's plea offer.
June 1, 2017		Denzal turned 21 years old.
August 7, 2017	21 years old	Prosecutor stated that the offer for three years in prison on the PSMV was invalid. (R. 74-75) APD Biel reiterated: "[i]n my reading of recent case law, Judge, [Denzal] **will never be** Class X mandatory." (R. 75-76) (emphasis added)
August 9, 2017	21 years old	APD Biel agrees after a contested hearing that the triggering date was the age at the time of conviction. (R. 80-81) By then Denzal was 21 years old, and as such was Class X mandatory.

What the foregoing demonstrates is that, far from "knowing" he was at risk of aging into a mandatory Class X prison sentence, Denzal was affirmatively given misinformation about his Class X eligibility on multiple occasions prior to his trial, or at a minimum, was receiving mixed messages regarding his eligibility for Class X sentencing. These facts provide the necessary context to understand why Denzal refused to accept a plea for prison time, and why he continued the case for a non-prison disposition, even after his 21st birthday – because he did **not** know that he was at risk of aging into a mandatory Class X sentence.

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The State insists that Denzal could have simply pleaded guilty and accepted the State's offer of three years in prison, and thereby avoided aging into a mandatory higher class of offense and a six-year term. (State Reply 33) The State's "solution," that Denzal simply accept a plea deal, requires a relinquishment of one's right to jury as well as the right to trial in order to avoid an unconstitutional sentence. Surely the State cannot induce a plea as a means to avoid an outcome that the law cannot impose: an unconstitutional sentence.

The State goes on to maintain that "there are good reasons" for making the "date of conviction" the determinative date, including, according to the State, "identifying defendants who are the best candidates for rehabilitation based on their present characteristics." (State Reply 35) Yet, the law and science supports the opposite conclusion: that adolescents and emerging adults are *more* amenable to rehabilitation. Accordingly, it makes absolutely no sense to have those defendants who are among the best candidates for rehabilitation, emerging adults, age into mandatory Class X prison sentences. See, *e.g.*, *People v. House*, 2021 IL 125124, ¶ 60 (providing for the application of *Miller* to young adults through the proportionate penalties clause); *Center for Law, Brain & Behavior at Massachusetts General Hospital*, White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys and Policy Makers (January 27, 2022), (classifying "persons ages 18-21" as "late adolescents," and demonstrating that post-*Miller* research "extends much of the science that resonated with the *Miller* court to late adolescents" as a class). [2]

Section 95(b) arbitrarily penalizes a defendant not for his culpability, but for the passage of time, and thus violates the proportionate penalties clause. This

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[2] Available at https://clbb.mgh.harvard.edu/white-paper-on-the-science-of-late-adolescence/ (last visited April 21, 2022)

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Court should vacate Denzal's Class X sentence and remand to the trial court for him to be sentenced anew to a Class 2 term of years.

B. Basing a defendant's eligibility for Class X sentencing on his age at the time of the finding of guilt and sentence rather than the age at the time of the commission of the offense violates constitutional due process protections.

Due process requires that criminal defendants have fair warning of the criminal penalties that will attach to their conduct – a right which is "fundamental to our concept of constitutional liberty." *Marks v. United States*, 430 U.S. 188, 191-92 (1977). (Def. Br. 55) However, Section 5-4.5-95(b) failed to provide fair notice to Denzal, because at the time an offense is committed, a defendant under the age of 21 will face several factors outside his control which will affect his conviction date. The State's argument to the contrary is unavailing.

In arguing that §95(b) provided Denzal with fair notice, the State contends that the statute alerts a person "of the *possibility*" that he "*could become* Class X mandatory, because he *might not* be convicted until after his 21st birthday." (State Reply 39) (emphasis added). The State's conditional phrasing serves to illustrate that for a 20-year-old defendant, Class X sentencing is a possibility, but not a certainty. While the State asserts that the statute is not dependent on "some future event," the State's postition is refuted by the State's own acknowledgment that the statute only provides notice to under-21-year-old defendants "of the possibility" that they "*could* become" subject to Class X sentencing, because they "might not be" convicted until after they turn 21. (State Reply 39) This Court has required "clarity in a statute [to] allow[] citizens to conform their behavior to a law without having to guess at its meaning." *Fagiano v. Police Board*, 98 Ill. 2d 277, 282 (1983). In this case, §95(b) does not provide the requisite clarity to a 20-year-old defendant that they may "age into" a higher class of offense;

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instead, making that determination requires guesswork.

The "future event" that determines the applicability of the statute is, of course, the defendant's turning 21 years of age. At the time a defendant under the age of 21 is contemplating a criminal offense, he has no way of knowing whether the triggering event of his turning 21 will happen by the date of his conviction, and §95(b) therefore fails to provide the fair warning which is required *at the time of the offense*. The State contends that due process requires that a statute be sufficiently clear such that persons of common intelligence can "understand the risk" of aging into a higher class of offense. (State Reply 39) Yet, such a risk is nearly impossible to quantify, because at the time an offense is committed, a defendant under the age of 21 will face several factors outside his control that will affect his conviction date, including the timing of the prosecutor's charging decision, the defendant's rights under the speedy trial statute, how crowded the court's docket is, and the backlog of cases handled by his attorney or public defender.

The State's cited cases are inapposite and do not address this unique situation where the events in those cases that triggered the higher class of sentence were the defendants' own volitional acts, and not events over which the defendants had no control. (State Reply 39-40)*; Cf. People v. Falbe*, 189 Ill. 2d 635, 641 (2000) (holding that statute criminalizing possession of a controlled substance with intent to deliver within one of the protected zones was clear and provided fair warning that defendants' conduct will result in a enhancement to a Class X term); *People v. Johnson*, 182 Ill. 2d 96, 111 (1988) (holding that the death penalty eligibility statute places a defendant on notice that, after committing a murder, the commission of additional murders would make him eligible for the death penalty.) In contrast to the defendants in *Falbe* and *Johnson*, it was not Denzal's volitional act that mandated the higher class of punishment, but only the passage of time. Denzal's

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offense was no more serious after he turned 21 than it was when he committed it at 20 years old.

The State's solution is for a 20-year-old defendant to makes sure he is tried, or to capitulate to a guilty plea, before he turns 21. (State Reply 38) While expedient, that resolution disregards the other constitutional rights that protect a defendant, such as the right to effective assistance of counsel: in this case, the mixed messages to Denzal, both that he would become eligible for Class X on his 21st birthday (R. 49-50), and that he "would never be Class X eligible," (R. 60, 75-76), led to time running out on the possibility of a Class 2 term of years, ten months after the arrest.

The State cites *People v. Brown*, 2017 IL App (1st) 140508-B, to support its claim that a defendant does not have to know the sentencing range "with mathematical certainty." (State Reply 38); *Brown*, 2017 I App (1st) 140508-B, ¶ 22. *Brown*, however, is explicitly limited to its facts. The *Brown* court specifically observed that the defendant committed the crimes *less than a month* before his 21st birthday. As such, the *Brown* court held, "limiting our analysis to the facts before us, ... we find that Brown had the requisite fair warning of the criminal penalties attaching to his conduct." *Id*. Denzal was ten months away from his 21st birthday, and as such, he did not have fair warning.

Further examples of how the application of §95(b) to a defendant like Denzal who was 20 at the time of offense but turned 21 before his conviction violate the due process clause's prohibition against arbitrary enforcement and absurd results are:

- counsel must choose between filing a meritorious pre-trial motion and getting his client to trial before the defendant turns 21;
- counsel must choose between locating a witness helpful to the defense

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or getting his client to trial before the defendant turns 21;

- a defendant who succeeds on a pre-trial suppression motion while 20 -years-old could face a mandatory Class X term if the State successfully appeals that ruling and the defendant has turned 21 in the interim;
- a defendant found unfit at age 20 who is restored to fitness after turning 21 would face mandatory Class X sentencing;
- without definitively knowing pre-trial what sentencing range his client faces, counsel cannot intelligently advise his client;
- a defendant's decision to waive a jury trial and take a bench trial could be influenced by whether the court calender had jury trial availability before the defendant's 21 birthday; and
- a defendant seeking to plead guilty shortly before his 21st birthday to avoid a mandatory Class X sentence could lose that opportunity if his attorney was ill that day and needed to seek a continuance.

The State fails to explain how a person of *any* level of intelligence would not be required to guess at whether he would in fact turn 21 by the date of his conviction in light of this variety of wholly arbitrary factors that are completely out of the defendant's control. Measuring a youthful offender's eligibility at the time of conviction and sentence arbitrarily penalizes defendants for the length of time the trial proceedings take, which as demonstrated by the above, is based on factors beyond their control. As a result, there is no rational basis for §95(b)'s reliance on a defendant's age at the time of conviction and sentencing.

C. Basing eligibility for Class X sentencing on a defendant's age at the time of the conviction rather than age at time of the offense violates the constitutional prohibition on *ex post facto* laws.

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Denzal argued on cross-appeal that the latent effective date in §95(b), which triggers Class X sentencing if such defendants turn 21 before they are convicted, violates both principles which undergird the *ex post facto* clause, in that it is both arbitrary and fails to provide fair notice at the time of the offense of the applicable punishment. *Miller v. Florida*, 482 U.S. 423, 430 (1987). Young defendants such as Denzal have no way of knowing when they commit their offenses if they will be subject to mandatory Class X sentencing. The "notice" that §95(b) provides to defendants under the age of 21 is thus illusory.

In response, the State maintains that §95(b) was enacted before Denzal committed the crime and that recidivism statutes have consistently been upheld against *ex post facto* challenges. (State Reply 45-48) The cases cited by the State, like the State's argument itself, are not responsive to Denzal's claim. In *Hill v. Walker*, this Court held that the statutory amendment reducing the frequency of parole hearings was not a violation of constitutional prohibition on *ex post facto* laws as it "d[id] not create a significant risk of increasing [defendant]'s incarceration." *Walker*, 241 Ill. 2d 479, 494 (1986); (State Reply 46). Here however, the internal effective date in the statute – Denzal's 21st birthday – which occurred after Denzal committed the offense at issue, not only created "a significant risk of increasing" Denzal's term of prison, the internal effective date *mandated* that the punishment for the offense be elevated to a Class X prison sentence. This mandatory elevation *doubled* Denzal's minimum term of incarceration, a "significant increase" in Denzal's term of incarceration. Thus, *Hill* does not apply here.

Similarly, in *People v. Johnson*, the trigger for death penalty eligibility was not an event that defendant had no control over, but involved the actual commission by defendant of a separate murder. *Johnson*, 182 Ill. 2d 96, 111 (1988); (State Reply 46-47). This Court found that when defendant committed his first

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murder, "he had fair warning that he would be eligible to receive the death penalty if he committed additional murders." *Id*. That is, defendant's own volitional act, over which he had control to commit or not to commit, was the trigger for his increased sentence. In *Johnson*, therefore, the "fair warning" is a certainty: a defendant who commits a second murder **is** eligible for the death penalty.

In stark contrast, here the "future event" that determines the applicability of the statute is, of course, the defendant's turning 21 years of age. The "fair warning" thus is not a certainty, but merely a possibility: **if** a defendant turns 21 before conviction, then he will be subject to a higher class of penalty. But whether a defendant will turn 21 before conviction is affected by a wide variety of factors that are largely outside of a defendant's control. Thus a defendant, like Denzal, does not have "fair warning" at the time he commits an offense that "he would be eligible" for mandatory Class X sentencing. See (Def. Br., Arg. II. B, 56); *Johnson*, 182 Ill. 2d at 111. Instead, a defendant may know that he may become eligible– in Denzal's case he was told both that he was and was not eligible, at different times, and only definitively told that he was Class X mandatory after he turned 21. (R. 80-81) The potential for arbitrary application of §95(b) is substantial, and invites the very arbitrariness the *ex post facto* clause is designed to prevent. See *Miller v. Florida*, 482 U.S. at 429 (*ex post facto* clauses in the constitution to restrain legislation from passing arbitrary laws).

Notably, the State's reply does not actually address the problem raised by Denzal, which is that he had no idea what sentence he was facing at the time he committed the crime. In fact, whether or not Denzal was subject to a mandatory Class X term was the topic of a contested hearing – by parties (including a judge) knowledgeable in the law. (R. 45, 49-50, 60, 74, 75-83); (Def. Br. 8-11) The State does not address the fact that an event that takes place after the offense and that

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is out of the defendant's control – turning 21 years of age – is the latent effective date for the statue's applicability. (State Reply 47); (Def. Br. 59-60) Nor does the State have an answer for the Supreme Court's observation in *Miller v. Florida*,482 U.S. 423, 429, that "[t]he constitutional prohibition against *ex post facto* laws cannot be avoided merely by adding to a law notice that it might be changed." As such, the "notice" in §95(b), that a defendant *might or might not* be subject to mandatory Class X sentencing based on a future event that is largely outside the defendant's control and cannot be accurately predicted, fails to pass constitutional muster. *Collins v. Youngblood*, 497 U.S. 42 (statute violates *ex post facto* if it increases punishment for crime after it was committed).

D. Basing a defendant's eligibility for Class X sentencing on his age at the time of the conviction and sentence rather than at the time of commission of the offense violates the constitutional right to equal protection.

The State's equal protection argument in its reply brief is identical to that raised in its due process argument. (State Reply 48-49) Accordingly, Denzal stands on the arguments contained in his request for cross-relief and reply. (Def. Br. 62-65, Reply 10-14) Here, where the applicability of §95(b) is measured by defendant's age at the time of sentencing rather than at time of the offense, Denzal's right to equal protection was violated.

E. This Court may address Denzal's constitutional challenges to §95(b).

While the State asserts that these constitutional challenges are forfeited because they were not raised in the appellate court (State Reply 25-26), it is well-established that a constitutional challenge to a statute may be raised for the first time on appeal. *People v. Wagener*, 196 Ill. 2d 269, 279 (2001). Denzal acknowledges that he did not set forth this argument before the appellate court. Nevertheless, this Court "can sustain the decision of a lower court for any

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appropriate reason, regardless of whether the lower court relied on those grounds and regardless of whether the lower court's reasoning was correct." *People v. Johnson*, 208 Ill. 2d 118, 129 (2003). Moreover, an appellee "may seek and obtain any relief warranted by the record on appeal without having filed a separate petition for leave to appeal or notice of cross-appeal or separate appeal." Ill. S. Ct. R. 318(a) (2021); *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 242 (2006); *People v. Hopkins*, 235 Ill. 2d 453, 467 (2009). The State does not address this authority, cited in Denzal's brief. (Def. Br. 66-67)

People v. Dorsey, cited by the State for forfeiture, involved forfeiture by appellant of an issue not raised in his petition for leave to appeal to this Court. 2021 IL 123010, ¶ 69. (State Reply 26) Here, Denzal is not the appellant, but the appellee, raising issue on cross-appeal. See Ill. S. Ct. R. 318(a) ("In all appeals, by whatever method, from the Appellate Court to the Supreme Court, any appellee, respondent, or coparty may seek and obtain any relief warranted by the record on appeal without having filed a separate petition for leave to appeal or notice of cross-appeal or separate appeal.") As such, *Dorsey* is inapposite.

Further, the State's position misapprehends this Court's holding in *People v. Thompson*. (State Reply 26); 2015 IL 118151. Notably, the nature of the as-applied constitutional challenge raised in *Thompson* is different from the challenge raised in this case, where every fact and circumstance necessary to address Denzal's claim is *already in the record*. In *Thompson*, the defendant argued that he was functionally equivalent to juveniles (and thus, the holding of *Miller* should apply to him), based on emerging scientific research establishing that the brain continues developing until one's mid-20's. *Thompson*, 2015 IL 118151, ¶ 21. In that circumstance, this Court concluded that a record needed to be developed in the trial court with respect to *how* the emerging science applied to the defendant's

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own brain development. *Thompson*, 2015 IL 118151, ¶ 38. This Court rejected Thompson's as-applied challenge because the record contained "nothing about how that science applies to the circumstances of defendant's case, the key showing for an as-applied constitutional challenge." *Id.* at ¶ 38. That holding was a specific application of the general requirement for any as-applied challenge "that the record be sufficiently developed in terms of [the] facts and circumstances" underpinning the particular claim at issue. *Id.* at ¶ 37.

Here, in contrast, Denzal's claims are based solely on the fact of his date of birth and the plain language of §95(b), so that no further factual development is necessary to address them. See *People v. Holman*, 2017 IL 120655, ¶ 32 (this Court chose to address the merits of defendant's as-applied constitutional challenge in interest of judicial economy where all facts and circumstances necessary to decide claim were in record.) Significantly, the claims here do not require factual development. As such, this Court may address Denzal's claims on the merits.

Moreover, as the State concedes, a facial challenge to a statute can be raised at any time. (State Reply 25); *Thompson*, 2015 IL 118151, ¶¶ 32–34; *People v. Wagener*, 196 Ill. 2d 269, 279 (2001); *People v. Bryant*, 128 Ill. 2d 448, 454 (1989). This Court has stated that a statute is facially unconstitutional "only if there is no set of circumstances under which the statute would be valid." *People v. Gray*, 2017 IL 120958, ¶ 58. However, this Court recently clarified that a challenge to the constitutionality of a statute as to an entire class of people is, in fact, a facial challenge. *People v. Harris*, 2018 IL 121932, ¶ 53 (argument that Eighth Amendment prohibited mandatory *de facto* life without parole sentence for all young adults under age 21 "is a facial challenge"); see also *id.* at ¶ 70 (Burke, J., specially concurring) ("Because a constitutional violation committed by the legislature is inherent 'in the terms of the statute itself,' a constitutional claim brought against

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a mandatory minimum sentence is typically labeled a 'facial' challenge." (internal citations omitted)). If the defendant's challenge to a mandatory minimum sentence is successful, the remedy lies with the legislature, which must amend the sentencing [] statute to remove the constitutional violation."); see also, *People v. House*, 2021 IL 125124, ¶ 53 (Burke, J., specially concurring)(proportionate penalties clause challenge based on *Miller* is a facial challenge, not an as-applied one), citing *People v. One 1998 GMC*, 2011 IL 110236, ¶ 86 (Karmeier, J., specially concurring) (a facial challenge is one in which the constitutional flaw is inherent "in the terms of the statute itself"). Here, the legislature has remedied the constitutional flaw, by amending §95(b) so that a mandatory Class X term of prison applies only to those defendants who were 21-years-old at the time of all of their offenses. 730 ILCS 5/5-4.5-95(b)(eff. July 1, 2021).Thus, alternatively, under the rationale described by Justice Burke in *Harris* and *House*, this Court may also address Denzal's claim as a facial challenge. This is because he argues that the statutory scheme permitting a person under 21-years-old to age into a mandatory higher class of offense, due solely to the passage of time, is unconstitutional under the proportionate penalties clause of the Illinois Constitution for all young adult defendants who were younger than 21 at the time of the offense, but turned 21-years-old by the time of their conviction/ and sentence. *Harris*, 2018 IL 121932, ¶ 53; *House*, 2021 IL 125124, ¶ 53.

For the foregoing reasons, this Court can and should address the constitutional issues raised on cross appeal.

Section 95(b) permits a defendant to "age into" a greater punishment, penalizing a defendant not for his culpability, but for the passage of time. As such §95(b) is unconstitutional, as it violates the proportionate penalties clause of the Illinois constitution, and the *ex post facto*, due process, and equal protection clauses

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of the Illinois and United States constitutions.

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CONCLUSION

For the foregoing reasons, Denzal Stewart, defendant-appellee, respectfully requests that this Court affirm the order of the appellate court vacating Denzal's Class X sentence and remanding to the circuit court for resentencing in the Class 2 range. Alternatively, this Court should find that the application of Section 5-4.5-95(b) to a defendant like Denzal, who was 20 at the time of offense but turned 21 before his conviction and sentence, violates the proportionate penalties clause of the Illinois constitution, and the *ex post facto*, due process and equal protection clauses of the Illinois and United States Constitutions.

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 20 pages.

/s/Ginger Leigh Odom
GINGER LEIGH ODOM
Director of Expungement

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No. 126116

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- DENZAL STEWART, Defendant-Appellee.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-18-0014. There on appeal from the Circuit Court of Cook County, Illinois , No. 16 CR 60199. Honorable Joseph M. Claps, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@ilag.gov;

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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 April 22, 2022, the Reply in Support of Request for Cross-Relief 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-appellee in an envelope deposited in a U.S. mail box in Chicago, 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 in Support of Request for Cross-Relief to the Clerk of the above Court.

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