No. 128474

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. BRYAN N. BRUSAW, Defendant-Appellee.	) On Appeal from the Appellate of) Illinois, Third Judicial District,) No. 3-19-0154.)) There on Appeal from the Circuit) Court of the Twelfth Judicial) Circuit, Will County, Illinois) No. 17 CF 1812.)) The Honorable) Sarah F. Jones,) Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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ARGUMENT

Defendant's claim that the trial court erred in not ruling on his pro se motion for substitution of judge is barred because he acquiesced to any error by the court. Accordingly, plain error review is unavailable. But even if defendant's actions did not amount to acquiescence, his inaction clearly establishes forfeiture. Contrary to defendant's arguments, neither the fact that his claim relates to a constitutional right nor that it is potentially meritorious renders it immune from forfeiture. Defendant can prevail on his forfeited claim only if he establishes plain error, which he cannot do. Because defendant was represented by counsel, his pro se motion for substitution of judge was barred by the prohibition against hybrid representation, and no error occurred, let alone plain error. Moreover, defendant does not argue that any error was first prong plain error, and any alleged error did not rise to the level of second prong plain error because error under subsection 114-5(a) of the Code of Criminal Procedure (Code) (725 ILCS 5/114-5(a)) is not structural error.

I. Defendant acquiesced to any error by the trial court in failing to rule on his pro se motion for substitution of judge.

Defendant's claim is barred because he acquiesced to any error by the trial court when he actively participated in the subsequent proceedings. *See People v. Harvey*, 211 Ill. 2d 368, 385 (2004); *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001).

Defendant's participation in the proceedings went beyond merely failing to object that the trial court did not rule on his pro se motion. Through counsel, defendant *asked* the court not to rule on the pro se motion and instead to delay consideration of it. R19. Then, both defendant and his counsel continued to participate in proceedings before the named judge without complaint and without any mention of the motion to substitute judge. Indeed, defendant requested that the judge adjudicate his case when he requested a bench trial. *See* C48; R58-61. Although, as defendant notes, *see* Def. Br. 26,[1] defendant did not specifically name the Honorable Sarah F. Jones in his request for a bench trial, a trial before her was the almost certain result of his request, as Judge Jones has presided over the previous seven months of proceedings, R18-58. Moreover, when asking for the bench trial, defense counsel proposed a trial date and asked if the date was agreeable to Judge Jones, clearly indicating a knowledge and intention that the trial would proceed before her. R58-59.

Consequently, defendant acquiesced to the trial judge's continued participation in proceedings. And because defendant acquiesced to any error, his claim is not subject to plain error review. *See Harvey*, 211 Ill. 2d at 385 (claims waived through acquiescence are not subject to plain error review); *see also People v. Patrick*, 233 Ill. 2d 62, 77 (2009).

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[1] Citations to the People's opening brief, the appendix to the People's opening brief, and defendant's appellee brief appear as "Peo. Br. __," "A __," and "Def. Br. __," respectively.

II. At a minimum, defendant forfeited his claim.

Even if defendant's actions did not amount to acquiescence, his inaction — both in failing to seek a ruling on his pro se motion and in failing to include his claim in a post-trial motion — clearly establishes forfeiture. *See People v. Jackson*, 2022 IL 127256, ¶ 15 ("We have long held that, for a criminal defendant to preserve an issue for review on appeal, the defendant must object at trial and raise the issue in a written post-trial motion.").

Defendant concedes that he failed to raise a contemporaneous objection to the trial court's purported failure to address the pro se motion and that he failed to include his claim in a post-trial motion. *See* Def. Br. 26-29. But he argues that claims pursuant to subsection 114-5(a) are immune from forfeiture. Defendant is incorrect.

Motions for automatic substitution of judge are not "self-executing" such that they are immune from forfeiture principles. Although defendant asserts that motions to substitute as a matter of right are self-executing, he concedes that the trial court must first determine whether the motion meets the statute's requirements before the case is transferred to another judge. Def. Br. 19. Because the parties agree that the court must take action on the motion before any substitution occurs, any question whether the phrase "self-executing" properly describes motions for automatic substitution of judge is immaterial. Under longstanding forfeiture principles, when a party wishes the court to take some action, that party bears the responsibility of

prompting the court to act. *See, e.g.*, *People v. Johnson*, 159 Ill. 2d 97, 123 (1994); *see also People v. Haywood*, 2016 IL App (1st) 133201, ¶ 25. Here, defendant insists he wanted the court to act by ruling on his motion to substitute, but he never prompted the court to do so.

Defendant's failure to seek a ruling on his pro se motion to one side, his failure to include the claim in a post-trial motion alone renders the claim forfeited. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) ("*Both* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial.") (emphases in original.).

Nor can defendant escape his forfeiture through appeal to the voidness doctrine because violations of subsection 114-5(a) do not render the court's subsequent actions void. Pursuant to *People v. Castleberry*, 2015 IL 116916, only two circumstances render a judgment "void" and thus exempt from forfeiture: "(1) where the judgment was entered by a court that lacked personal or subject matter jurisdiction, [or] (2) where the judgment was based on a statute that is facially unconstitutional." *People v. Price*, 2016 IL 118613, ¶¶ 30-31 (emphasis added). Neither exception applies here, so the court's judgment is not void. *See id.*

Defendant's reliance on *People v. Tate*, 2016 IL App (1st) 140598, ¶ 36, which held that "the inherent authority doctrine [of voidness] is alive and well" following *Castleberry*, is misplaced because the appellate court's decision in *Tate* predates this Court's contrary holding in *Price*, 2016 IL

118613, ¶¶ 30-31. And defendant's reliance on a single post-*Castleberry* decision for the proposition that this Court has continued to hold that violations of the statutory right to an automatic substitution of judge render the judgment void, Def. Br. 28 (citing *Palos Community Hospital v. Humana Insurance Company, Inc.*, 2021 IL 126008, ¶ 34), is also misplaced. That case does not use the word "void" in its discussion and does not involve a forfeited claim. *See Palos Community Hospital*, 2021 IL 126008, ¶ 18.

Nor — contrary to defendant's suggestion — has this Court "constitutionalized" subsection 114-5(a) such that his claim is exempt from forfeiture principles. *See* Def. Br. 23. First, although subsection 114-5(a) relates to the constitutional right to an impartial adjudicator, it is a *statutory* right. *See infra* pp. 12-13; *see also* Peo. Br. 20-22. Second, even if defendant's claim stemmed directly from the constitution, it would still be subject to forfeiture. *People v. Allen*, 222 Ill. 2d 340, 352 (2006) ("[E]ven constitutional errors can be forfeited.").

Finally, defendant's argument that applying ordinary principles of forfeiture to subsection 114-5(a) motions would "elevate form over substance" because it could result in the denial of otherwise meritorious claims, *see* Def. Br. 23 (citing *Tate*, 2016 IL App (1st) 140598, ¶ 44), ignores the premise and purpose of the forfeiture doctrine. By definition, enforcing a defendant's forfeiture — by foreclosing merits-based review — potentially bars meritorious claims whenever a party has failed to preserve the claim by

providing the trial court with an opportunity to correct the alleged error. Under defendant's argument, a court would have to review a claim's merits to determine whether to review the claim's merits, rendering forfeiture nonsensical. The forfeiture doctrine remains "fundamental to our adversarial system of justice" because it provides trial courts an opportunity to quickly correct perceived errors without wasting judicial resources with unnecessary appeals. *Jackson*, 2022 IL 127256, ¶ 15. The doctrine also "prevents criminal defendants from sitting idly by and knowingly allowing an irregular proceeding to go forward only to seek reversal due to the error when the outcome of the proceeding is not favorable." *Id.* These principles would be undermined by defendant's proposed rule.

Assuming *arguendo* that defendant properly filed the pro se motion for substitution of judge — *but see infra* section III.A — had defendant alerted the trial court of the need to act on it, the court could have determined whether the motion comported with subsection 114-5(a) and acted accordingly. But because defendant instead asked the court to defer addressing the motion, continued to participate in the proceedings without complaint, and then asked the trial judge to serve as the ultimate arbiter of his guilt, the trial court never had that opportunity. Only now — after the trial court delivered an unfavorable verdict for defendant — has he resurrected his substitution motion, in an attempt to secure a new fact finder

and a second bite at the apple. Holding defendant to his forfeiture serves precisely the purpose the forfeiture doctrine is intended to achieve.

In sum, defendant acquiesced to the trial judge's continued participation in his trial and review of his claim is therefore barred. Acquiescence aside, defendant has at minimum forfeited his claim, and it is subject to review under the plain error doctrine, if at all.

III. Defendant cannot establish plain error.

A. The trial court did not commit clear and obvious error because the pro se motion was not properly before the court.

Even if defendant merely forfeited his claim, he cannot excuse his forfeiture as plain error because he cannot establish clear or obvious error. *See People v. Moon*, 2022 IL 125959, ¶ 22 ("The first analytical step under the plain error rule is to determine whether there was a clear or obvious error."). Indeed, here, no error occurred because the pro se motion — filed while defendant was represented by counsel — was not properly before the trial court. A defendant represented by counsel generally has no authority to file pro se motions, and courts should not consider such motions. *See, e.g.*, *People v. Williams*, 2021 IL App (3d) 190082, ¶ 22; *see also* Peo. Br. 14-15. Consequently, defendant's pro se motion, filed while he was represented by appointed counsel, was unauthorized and not properly before the trial court.

To be sure, the hybrid representation bar does not extend to pro se allegations of ineffective assistance of counsel, but the reason for that exception does not extend to motions for substitution of judge. *Contra* Def.

Br. 7. Represented defendants may raise pro se claims of ineffective assistance of counsel for a simple reason: courts do not expect counsel to be able to adequately argue their own ineffectiveness. *See People v. Serio*, 357 Ill. App. 3d 806, 815 (2d Dist. 2005); *see also People v. White,* 322 Ill. App. 3d 982, 987 (4th Dist. 2001). But no such conflict exists in asking an attorney to file or adopt a motion pursuant to subsection 114-5(a). Such a motion is routine and requires no assertion against the attorney's self-interest. *See People v. Evans*, 209 Ill. 2d 194, 215 (2004).

Defendant's attempts to analogize subsection 114-5(a) to the constitutional rights that this Court has ruled ultimately must be invoked or waived by the defendant alone (and thus cannot be overridden by counsel), *see* Def. Br. 8-11, are misguided and would not save him from the bar against hybrid representation, in any event. This Court has recognized five decisions "that ultimately belong to the defendant in a criminal case after consultation with his attorney: (1) what plea to enter; (2) whether to waive a jury trial; (3) whether to testify in his own behalf; (4) whether to tender a lesser-included-offense instruction; and (5) whether to appeal." *People v. Phillips*, 217 Ill. 2d 270, 281 (2005).

The statutory right to file a motion for automatic substitution of judge is not among these rights. *See Phillips*, 217 Ill. 2d at 281. Recognizing that this Court has never included subsection 114-5(a) among the decisions reserved to the defendant, defendant asks the Court to look to the ABA

Standards for Criminal Justice 4-5.2(a)-(b), instead. Def. Br. 9. But the decision to file a motion for automatic substitution of judge is not included among that list either. *See* ABA Standards for Criminal Justice 4-5.2(a)-(b) (4th ed. 2017). Defendant further directs the Court's attention to a list of personal rights included in a treatise on criminal law, Def. Br. 9-10, but, yet again, the right provided by subsection 114-5(a) is not included on that list, *see* ABA Standards for Criminal Justice 4-5.2(a)-(b) (4th ed. 2017).

It is unsurprising that the statutory right provided by subsection 114-5(a) is not included on these lists because that right is inherently different than the five constitutional decisions granted solely to the criminal defendant. Subsection 114-5(a) does not provide a constitutional right. *See* Peo. Br. 12-13, 20-21. Unlike subsection 114-5(a), four of the five constitutional rights cited by this Court relate to a defendant's fundamental decision of whether to concede guilt or contest the charges against him: the initial decision of how to plead, the decision to testify and provide one's own version of events, the decision to seek a mitigated conviction through the proffer of an instruction on a lesser-included offense, and the decision to continue challenging the prosecution's case on appeal. The fifth, the decision whether to waive a jury trial, involves the fundamental question of what form of trial the defendant seeks — that is, whether to have his fate decided by one legal expert in the form of a trial judge or in the twelve laymen of a jury. But the decision to invoke subsection 114-5(a) does not affect the type of fact

finder or adjudicator presiding over a defendant's trial, only that individual's identity.

Thus, the statutory right to substitution of judge under subsection 114-5(a) is instead analogous to the right to make peremptory challenges during jury selection. Subsection 114-5(a) allows a defendant to challenge and remove a named judge from his trial without explanation. 725 ILCS 5/114-5(a). Similarly, Rule 434(d) allows a defendant to challenge and remove a named potential juror from his trial without explanation. *See* Ill. S. Ct. R. 434(d). In effect, subsection 114-5(a) grants a defendant one peremptory strike against a judge in his case. Like subsection 114-5(a), this Court has noted that the right to peremptorily strike jurors is of fundamental importance. *People v. Daniels*, 172 Ill. 2d 154, 165 (1996). But despite Rule 434(d)'s importance and relationship to the right to an impartial trial, the Court has held that defense counsel makes the ultimate decision on whom to strike, not the defendant. *Phillips*, 217 Ill. 2d at 281. It logically follows that defense counsel would similarly make the ultimate decision whether to use subsection 114-5(a) to obtain a new judge.

Defendant's suggestion that courts have routinely treated subsection 114-5(a) as a purely personal right because they hold that the timeliness of a motion depends on the defendant's personal knowledge is incorrect. *See* Def. Br. 11-16. Most of the cases cited by defendant do not discuss or suggest any distinction between the defendant's personal knowledge and the knowledge of

his counsel in the context of whether a subsection 114-5(a) motion is timely. *See People v. Thomas*, 58 Ill. App. 3d 460, 462-63 (1st Dist. 1978); *People v. Samples*, 107 Ill. App. 3d 523, 525-27 (5th Dist. 1982); *People v. Gunning*, 108 Ill. App. 3d 429, 430-32 (4th Dist. 1982); *People v. Williams*, 217 Ill. App. 3d 791, 794-97 (5th Dist. 1991); *People v. Harston*, 23 Ill. App. 3d 279, 281-82 (2d Dist. 1974). In three of the cases, the defendant was not represented by counsel at the time a judge was assigned, and thus the question of counsel's knowledge was irrelevant. *Thomas*, 58 Ill. App. 3d at 461-62; *Williams*, 217 Ill. App. 3d 794-95; *Harston*, 23 Ill. App. 3d at 281. In two of the cases, the courts did not focus on the defendant's knowledge, but instead considered when a case is placed on a judge's call, thus triggering the 10-day period in which to file the motion to substitute. *Samples*, 107 Ill. App. 3d at 525-27 (concluding that prevailing courthouse practices that generally place all cases before a single judge do not amount to an actual placement of a specific case before that judge); *Gunning*, 108 Ill. App. 3d at 430-32 (same). Moreover, none of these cases hold that subsection 114-5(a) confers a personal right upon defendant.

The remaining case defendant cites, Def. Br. 15-16 (citing *People v. Lackland*, 248 Ill. App. 3d 426 (1st Dist. 1993)), is equally inapposite. In *Lockland*, the defendant's case was placed on an initial judge's trial call until it was transferred to a second judge solely for a fitness hearing. *Id.* at 432. Almost a year later, the second judge ruled the defendant fit and denied a

motion to transfer the case back to the initial judge. *Id.* at 429. The defendant promptly filed a motion for automatic substitution of judge, which the trial court denied as untimely. *Id.* at 431-33. The appellate court reversed, holding that because the case was transferred to the second judge solely for a fitness hearing, it was not actually placed on the second judge's trial call until he refused to return the case to the initial judge. *Id.* In other words, like *Samples* and *Gunning*, the case turned on when the case was placed on the challenged judge's trial call — not whether it was the defendant or his counsel who had knowledge of that fact — and it is similarly inapposite. To be sure, in dicta, the appellate court stated, "It is defendant's right and responsibility to direct such a motion, not defense counsel's right." *Id.* at 433. But the court provided no citation or reasoning for this statement, *id.*, and to the extent that it can be read as holding that a defendant can file such a motion pro se even when represented by counsel, for the reasons explained above, *see supra* pp. 8-9, it is incorrect.

In any event, even if motions for substitution of judge were included among the rights reserved to defendants alone, neither defendant nor the appellate court below provided any support for the proposition that claims related to those rights are immune from the hybrid representation bar. *See* Def. Br. 8-11; *see also* A6. Indeed, the appellate court has held that the hybrid representation bar *does* apply to pro se filings related to the right to appeal. *See People v. Niffen*, 2018 IL App (4th) 150881, ¶ 19 (reasoning that

the bar would prevent a represented defendant from filing a pro se motion to withdraw his guilty plea to perfect appeal). Where claims involving the five decisions reserved to the criminal defendant himself do escape the bar on hybrid representation, it is because they typically arise from allegations of ineffective assistance. *See Florida v. Nixon*, 543 U.S. 175, 187-92 (2004) (analyzing ineffective assistance claim of whether counsel usurped defendant's choice to concede guilt); *Roe v. Flores-Ortega*, 528 U.S. 470, 477-81 (2000) (analyzing ineffective assistance claim of whether counsel usurped defendant's choice to appeal); *People v. Townsend*, 2020 IL App (1st) 171024, ¶ 38 (analyzing ineffective assistance claim of whether counsel usurped defendant's choice to waive jury trial); *People v. DuPree*, 397 Ill. App. 3d 719, 735 (2d Dist. 2010) (analyzing ineffective assistance claim of whether counsel usurped defendant's choice to proffer a jury instruction on a lesser-included-offense); *People v. Frieberg*, 305 Ill. App. 3d 840, 851 (4th Dist. 1999) (analyzing ineffective assistance claim of whether counsel usurped defendant's choice to testify). Defendant has never argued that counsel was ineffective for failing to file a subsection 114-5(a) motion or adopt defendant's pro se motion.

Accordingly, the trial court's failure to rule on defendant's pro se motion was not clear and obvious error because the motion was not properly before the court. In the absence of clear and obvious error, there can be no plain error. *See People v. McDonald*, 2016 IL 118882, ¶ 48.

B. The alleged error does not rise to the level of second prong plain error.

Even if defendant could establish clear or obvious error, he still could not satisfy the plain error doctrine. A defendant's forfeited claim may be reviewed only if a clear or obvious error occurred and (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Birge*, 2021 IL 125644, ¶ 24. Defendant has not argued that the evidence was closely balanced and has therefore forfeited any argument that first prong plain error occurred. *See People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Moreover, a violation of section 114-5(a) does not qualify as second prong plain error.

To show second prong plain error, a defendant must demonstrate that the alleged error is so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *Jackson*, 2022 IL 127256, ¶ 28. An error rises to the level of second prong plain error "only if it necessarily renders a criminal trial fundamentally unfair or is an unreliable means of determining guilt or innocence." *Moon*, 2022 IL 125959, ¶ 28. Thus, "[a] procedure that is not required in every criminal jury trial cannot be logically categorized as an essential element of every criminal jury trial on par with" second prong error. *Jackson*, 2022 IL 127256, ¶ 66.

Subsection 114-5(a) is not an essential element of every criminal trial. It is a statutory mechanism that operates to prophylactically protect a defendant's right to an impartial adjudicator, *People v. Walker*, 119 Ill. 2d 465, 470 (1988); *see also* Peo. Br. 12-13, 20-21, not the equivalent of the underlying right, *see Jackson*, 2022 IL 127256, ¶¶ 44-45, and the failure to provide an opportunity to exercise the protective mechanism does not "necessarily render" a trial unfair, *see Thompson*, 238 Ill. 2d at 609.

A violation of a statutory right rises to the level of second prong plain error only where (1) the statutory violation inevitably causes a violation of the underlying constitutional right, (2) other safeguards do not exist to protect the underlying right, and (3) there is an indication in the record that the underlying constitutional right was violated. *See Jackson*, 2022 IL 127256, ¶ 47. None of these factors apply to subsection 114-5(a) or defendant's case. A motion pursuant to subsection 114-5(a) does not require or provide proof of actual bias on the part of the trial judge, so continued proceedings before that judge do not necessarily violate the constitutional right to an impartial adjudicator. Furthermore, additional safeguards exist that more effectively protect the right to an impartial adjudicator: if a judge is actually biased, the defendant may move to substitute the judge for cause at any time, 725 ILCS 5/114-5(d), and the trial judge has an independent duty to recuse herself if there is even an appearance of bias, Ill. S. Ct. R. 63(c). Finally, there has been no suggestion and there is no indication in the

record that the trial judge was actually biased in this case. All three considerations weigh against finding second prong plain error.

In other words, the automatic substitution of judge provided by subsection 114-5(a) "is not required in every criminal jury trial" and "cannot be logically categorized as an essential element of every criminal jury trial on par with" second prong plain error. *See Jackson*, 2022 IL 127256, ¶ 66. Fair trials occur before impartial judges in cases where subsection 114-5(a) is never invoked. Moreover, if subsection 114-5(a) were truly necessary for a fair and constitutionally valid trial, such substitutions could not be limited to the brief, 10-day period after a case is assigned. 725 ILCS 5/114-5(a). Similarly, if automatic substitutions were really an indispensable right, they could not be limited to a single named judge. *See id.* Such limitations do not exist for motions for substitution for cause, proving that motions pursuant to subsection 114-5(a) are not an essential element of every criminal trial. Violations of subsection 114-5(a) thus are not second prong plain error.

III. Defendant's extended sentence should be vacated and reduced to the maximum non-extended sentence.

The parties agree that the trial court erred in imposing an extended term sentence on defendant's aggravated DWLR conviction. *See* Peo. Br. 22; Def. Br. 32-33. Thus, if this Court reverses the appellate court's judgment, it should reduce defendant's sentence on the DWLR conviction pursuant to Rule 615(b)(4) to the maximum non-extended sentence of three years. *See People*

v. Ramsey, 2018 IL App (2d) 151071, ¶ 30 (reducing unauthorized extended sentence to maximum non-extended term); *see also* 730 ILCS 5/5-4.5-45(a).

CONCLUSION

This Court should reverse the appellate court's judgment and, pursuant to the Court's authority under Rule 615(b)(4), reduce defendant's sentence on the DWLR conviction to the maximum non-extended term of three years.

June 5, 2023

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(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 17 pages.

/s/ Nicholas Moeller
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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On June 5, 2023 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, which provided notice to the following registered e-mail addresses:

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