No. 129585

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- ALVIN BROWN, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-22-0400. There on appeal from the Circuit Court of the Seventeenth Judicial Circuit, Boone County, Illinois, No. 17-CF-202. Honorable C. Robert Tobin III, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ARGUMENT

I.

Alvin Brown was entitled to elect the benefit of a Class X recidivism provision that took effect after sentencing but before the trial court ruled on the post-plea motion.

In his opening brief, Alvin Brown argued that he should have had the opportunity to elect to be sentenced under the amended Class X recidivism provision when that amendment was effective prior to the denial of his post-plea motion. In response, the State initially brings up two collateral matters that ultimately do not effect the outcome of the case – invited error and the effective date of the amendment.

First, the State contends that the invited-error doctrine precludes relief because defense counsel stated, at the post-plea hearing, that the amendment did not apply in ths case. (St. Br., p. 10-11) Yet, Mr. Brown raised a claim of ineffective assistance of counsel in his opening brief. (Def. Op. Br., p. 18-19) Although invited error "precludes plain-error analysis," (*People v. Holloway*, 2019 IL App (2d) 170551, ¶ 44), the same is not true for a claim of ineffective assistance of counsel. Indeed, the appellate court in the instant case considered the merits of the claim under the guise of ineffective assistance of counsel after finding that the invited-error doctrine applied. *People v. Brown*, 2023 IL App (4th) 220400, ¶ 31. Thus, regardless of whether this Court agrees with the State's invited-error argument, it still must consider the merits of this issue.

Second, the State argues that, by delaying the effective date of the amendment, the legislature "clearly stated its intent that the amendment apply prospectively only." (St. Br., p. 13) However, the effective date is ultimately

irrelevant. Indisputably, the amendment was not effective when Mr. Brown was originally sentenced, and it was effective when the motion to reconsider sentence was denied. Nothing in the plain language of the amended Class X recidivism provision addresses this situation. Accordingly, a delayed effective date sheds no light on the question at issue. In other words, merely saying that statute applies "prospectively only" begs the question: prospective based on the date of sentencing or the date of the denial of the motion to reconsider sentence?

On the merits, Mr. Brown relied on this Court's prior statement that a statute applies retroactively to pending cases, which this Court defined as "a case in which the *trial court proceedings* had begun under the old statute but had not yet been concluded." *People v. Hunter*, 2017 IL 121306, ¶ 30 (emphasis added). The State does not cite any cases where the new law was not applied to a case pending in the trial court when the amendment was effective. While the State relies on *People v. Lisle*, 390 Ill. 327 (1945), as Mr. Smith argued in his opening brief, there is no indication that the defendant's case in *Lisle* was pending in the trial court when the amendment became effective. (St. Br., p. 23; Def. Op. Br., p. 16) The State does not claim that the decision in *Lisle* indicates when the amendment became effective vis-à-vis when the notice of appeal was filed. Instead, the State merely cites the language from *Lisle* that an amendment "could only apply to those classes of cases in which a new law had become effective prior to the date of the actual sentence." *Lisle*, 390 Ill. at 328.

Nevertheless, "the process of statutory construction requires more than mechanical application of a rule of law or a decision of this court," but rather courts must "construe statutes in a manner that will avoid absurd, unreasonable, or

unjust results that the legislature could not have intended." *People v. Hunter*, 2017 IL 121306, ¶ 28.

Indeed, *Hunter* provides a prime example of this principle. In *Hunter*, this Court did not mechanically apply the phrase "pending cases" from *People ex rel. Alvarez v. Howard*, 2016 IL 120729, ¶ 28, because the *Howard* Court was not asked to consider the situation presented in *Hunter*. *Hunter*, 2017 IL 121306, at ¶ 29. Analogously, there is no indication that the *Lisle* Court had to address the situation presented in the instant case. As a result, one sentence from *Lisle* cannot be mechanically applied to the instant case without examining the real world consequences of this decision. *See People v. Jackson*, 2011 IL 110615, ¶ 12 (in analysis questions of statutory interpretation, this Court may consider "the consequences of construing the statute one way or another").

Here, the State's interpretation would lead to absurd results. As recognized by the Second District, "had the trial court granted defendant's [post-sentencing motion], the amended version of section 5-4.5-95(b) of the Code would have applied at defendant's new sentencing hearing, yet the State's position is that the amended provisions of the statute should not apply upon denial of that same motion." *People v. Spears*, 2022 IL App (2d) 210583, ¶ 28.

On the other hand, the State claims that Mr. Brown's interpretation would lead to absurd results because "it would be absurd to grant a windfall to defendant and not the similarly situated defendants who were sentenced following guilty pleas between November 2019 and July 2021, and whose attorneys' Rule 604(d) certificates did not have technical errors that proved immaterial." (St. Br., p. 25) The problem with this argument becomes apparent by looking at a related example.

If a defendant was sentenced, but had his sentence vacated on direct appeal based on the trial court considering an improper aggravating factor, upon a remand for resentencing, the defendant could elect to be sentenced under any new sentencing law that became effective following the original sentencing hearing. This hypothetical defendant would get a "windfall" over similarly-situated defendants whose original sentencing hearings did not include the consideration of an improper factor. Yet, even under the State's reading of the statute, the amendment would apply to the hypothetical defendant because it became effective before the ultimate sentence was imposed. Thus, it is not unprecedented for a defendant to be able to take advantage of a new amendment when an earlier error occurred.

Mr. Brown's final argument on the merits was that the rule of lenity supported his position because multiple appellate court districts have adopted his position. (Def. Op. Br., p. 18) (citing *People v. Whitney*, 188 Ill. 2d 91, 98 (1999) ("penal statutes are strictly construed in favor of the defendant as a general matter")). The State does not address the rule of lenity in its brief.

Alternatively, the State claims that, even if the amended sentencing statute applied to Mr. Brown, he cannot establish prejudice. Notably, prejudice is not an outcome-determinative test. Instead, a defendant need show only that a different outcome would be reasonably probable. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). In the sentencing context, this means showing a reasonable probability that the trial judge would have imposed a lesser sentence if counsel had not erred. *People v. Billups*, 2016 IL App (1st) 134006, ¶ 16.

In the instant case, when the trial court applied a vastly different sentencing range than that which would have applied under the amended statute, there is

a reasonable probability of a lower sentence. It must be presumed that the court considered the sentencing range in imposing a sentence. *See generally People v. Stoffel*, 239 Ill. 2d 314, 327 (2010) ("The trial court is presumed to know and follow the law."). Indeed, courts routinely remand cases for resentencing where the trial court applies the wrong sentencing range even if the ultimate sentence was in the correct sentencing range. *See, e.g., People v. Richards*, 2021 IL App (1st) 192154, ¶ 31; *People v. Hall*, 2014 IL App (1st) 122868, ¶ 15; *People v. Owens*, 377 Ill. App. 3d 302, 305-06 (1st Dist. 2007); *People v. Carmichael*, 343 Ill. App. 3d 855, 861-62 (1st Dist. 2003).

Here, there was not just a minor discrepancy in the sentencing range. Instead, both the minimum and maximum sentence at least doubled. Under the amended statute, the sentencing range was 3 to 14 years. 730 ILCS 5/5-4.5-35(a) (2022). Conversely, under the prior version of the statute, the sentence range was 6 to 30 years. 730 ILCS 5/5-4.5-25(a) (2022). The nine-year sentence Mr. Brown received is in the lower quarter of the Class X sentencing range, whereas it is over the midpoint of the extended-term Class 2 sentencing range. This disparity in the sentencing range distinguishes this case from *People v. Riegle*, 246 Ill. App. 3d 270 (3d Dist. 1993), a case cited by the State. (St. Br., p. 28) In *Riegle*, the trial court thought the sentencing range was 9 to 40 years, when it really was 6 to 30 years. 246 Ill. App. 3d at 275. This difference is much less significant than the one in the instant case.

Mr. Brown's case is also distinguishable from the other two cases cited by the State. (St. Br., p. 27-28) First, *People v. Price*, 2011 IL App (4th) 100311, ¶ 33, does not involve the court considering the wrong sentencing range, but an

attorney not filing a motion to reconsider sentence. As such, it does not address the issue in this case. Second, in *People v. Arbuckle*, 2016 IL App (3d) 121014-B, ¶ 37, the defendant was sentenced to four years, which was not in the extended-term sentencing range and was not even the maximum non-extended term sentence. Here, Mr. Brown's sentence was in the extended-term Class 2 sentencing range and three years over the maximum non-extended Class 2 sentence.

Finally, the most important sentencing factor is the seriousness of the offense. *People v. Flores*, 404 Ill. App. 3d 155, 159 (2d Dist. 2010). Mr. Brown was given a nearly decade-long prison sentence for driving without a license. The amended Class X sentencing provision shows that the legislature views this non-forcible felony as deserving a lesser prison sentence. 730 ILCS 5/5-4.5-95(b) (2021) (limiting mandatory Class X sentences to forcible felonies). Therefore, there was at least a reasonable probability of a lesser sentence if the trial court had applied the correct sentencing range.

For all these reasons, this Court should vacate Mr. Brown's Class X sentence and remand the matter for resentencing.

II.

Where defense counsel, at the post-plea hearing, withdrew the one issue raised in the post-plea motion and argued a separate issue not raised in the written motion, he left Mr. Brown with no appealable issues, thereby failing to comply with his duties under Rule 604(d).

In his opening brief, Alvin Brown alternatively argued that post-plea counsel failed to comply with his duties under Rule 604(d) by leaving Mr. Brown with no issues preserved for appeal. Specifically, counsel filed a post-plea motion that contained only one allegation – that Mr. Brown did not understand the consequences of his plea. (C. 159) Yet, at the post-plea hearing, counsel withdrew this issue, and proceeded only on a claim that the sentence was excessive. (R. 129-30)

In response, the State does not argue that counsel's post-plea motion preserved any issues for appeal. Instead, the State claims that counsel was proceeding on Mr. Brown's *pro se* motion to reconsider sentence, which the State asserts preserved an excessive sentence claim for appeal. (St. Br., p. 28) The State's argument should be rejected for multiple reasons.

First, defense counsel on remand never explicitly stated that he was adopting the *pro se* motion. Although, prior to remand, counsel made statements implying that he was proceeding on the *pro se* motion, (R. 104-05), that hearing occurred *before* counsel filed his own post-plea motion. At that point, the *pro se* motion was the only post-sentencing motion that counsel could have relied on. However, after remand, counsel had filed his own motion. While counsel's motion did not preserve any sentencing issues for appeal, it was titled, "Motion to Withdraw Guilty Plea *and Vacate Sentence*." (C. 159) (emphasis added). Thus, the fact that counsel made a sentencing argument did not foreclose the possibility that he was relying on the motion he filed. Indeed, counsel at the hearing on remand stated, "Judge, we

have filed a motion to … withdraw the guilty plea and a motion *to vacate the sentence and have him resentenced*." (R. 129) (emphasis added). Counsel's language demonstrates that he was relying on his own motion, not on the *pro se* motion.

The State claims that "counsel was clear at the initial hearing on the motion to reconsider that defendant was pursuing that [*pro se*] motion without amendment, (R. 104-05) and reiterated that position in the post-remand hearing, (R. 129)." (St. Br., p. 30) Notably, the State does not include any specific quote from the post-remand hearing where counsel allegedly made this statement. Examining the page cited by the State, counsel never stated that he was adopting the *pro se* motion to reconsider sentence. (R. 129) As such, it cannot be said that counsel was relying on the *pro se* motion.

Even if counsel had adopted the *pro se* motion, it did not preserve any issues for appeal. The State claims that an excessive sentence argument was preserved because the motion stated, "The defendant requests that the Court review the sentence imposed because there exists a litany of substantial extenuating circumstances that surround the above captioned cause." (St. Br., p. 30) (citing C. 75) Notably, the appellate court, in its opinion below, never mentioned this language, and, the State is advancing a theory different than that relied on by the appellate court.

Furthermore, the State does not cite any case law to support its position that the language here preserved the issue for appeal. Accordingly, the State has arguably forfeited this issue. Even when there is no case law directly on point, the State, as the appellee, should "at least provided some analysis supported by the most closely analogous case law available," and the failure to do so results in forfeiture. *People v. Rivera*, 2020 IL App (2d) 171002, ¶ 11. The State has

ultimately provided no analysis on how much detail is necessary to preserve an issue in a motion to reconsider sentence.

In fact, case law refutes the State's argument. First, Mr. Brown's position conforms with the strict waiver requirements of Rule 604(d). *See generally People v. Janes*, 158 Ill. 2d 27, 35 (1994); *see also People v. Prather*, 379 Ill. App. 3d 763, 768 (4th Dist. 2008) ("this court cannot simply assume or infer compliance with Rule 604(d) because the strict waiver requirements of Rule 604(d) demand that any issue not raised in the motion to reconsider the sentence or the motion to withdraw the plea of guilty is forfeited").

Likewise, in *People v. Little*, 337 Ill. App. 3d 619, 622 (4th Dist. 2003), the appellate court held that a motion to reconsider sentence did not preserve any issues for appeal when it "did not state any reasons to support [the] request for reduction of sentence." Similarly, in Mr. Brown's case, merely saying the phrase "a litany of substantial extenuating circumstances" without any explanation of what those circumstances were is the equivalent of offering no reasons at all to support the motion to reconsider sentence. Furthermore, it cannot be overlooked that *pro se* motion was a boilerplate motion with blanks to fill in for the information about the individual case. The "substantial extenuating circumstances" language was part of a pre-printed sentence. The immediately-following sentence stated, "The defendant further states the following in support of his motion (State all the reasons why you believe your sentence should be reduced)" followed by several blank lines with nothing filled in on them. Practically, there is no difference between the *pro se* motion here and the deficient motion filed in *Little* as they both "did not state any reasons to support his request for reduction of sentence." 337 Ill. App. 3d at 622.

The State attempts to distinguish *Little* based on the fact that counsel here "elaborated" on the sentencing claim at the post-plea hearings. (St. Br., p. 30-31) However, counsel's oral statements cannot cure his failings because Rule 604(d) requires that a post-plea motion "shall be *in writing* and shall state the grounds therefor." S. Ct. R. 604(d) (emphasis added).

Rule 604(d) "requires more than the mere *pro forma* filing of a motion to reduce sentence." *Little*, 337 Ill. App. 3d at 621. Nothing could be more *pro forma* than a fill-in-the-blank motion without the blanks filled it. (C. 75-76) As such, counsel's failure to include any grounds to support the request to reduce the sentence was a failure to comply with Rule 604(d).

Moreover, there were potential grounds to support the motion to reconsider sentence that were not included in the written motion. As argued at the original sentencing hearing, there were mitigating factors in this case, including that Mr. Brown suffered from drug addiction and had family support. (R. 79) Even beyond that, at the hearing on remand counsel, although not acknowledging that the amended Class X statute was retroactive, stated that this amendment should be considered as a reason why the sentence should be reduced. (R. 129-31) Thus, counsel's own actions showed that he did not make the necessary amendments to the post-plea motion. *See People v. Winston*, 2020 IL App (2d) 180289, ¶ 18 ("We fail to see how counsel could raise a new claim at the hearing and yet deem it unnecessary to amend the motion to include that claim."); *People v. Willis*, 2015 IL App (5th) 130020, ¶¶ 13, 20 (defense counsel, by orally raising an issue at the post-plea hearing that was not in the written post-plea motion, refuted his own 604(d) certificate). Mr. Brown cited *Winston* and *Willis* in his opening brief, but the State does not attempt to distinguish them or explain why their holding does

not apply in this case. (Def. Op. Br., p. 22) For this reason alone, post-plea counsel's facially-sufficient 604(d) certificate was refuted by the record.

In conclusion, this Court must vacate the denial of Mr. Brown's post-plea motion and remand the case for: (1) the filing of a valid Rule 604(d) certificate; (2) the opportunity to file a new post-plea motion; and (3) a new motion hearing. *People v. Bridges*, 2017 IL App (2d) 150718, ¶ 12.

CONCLUSION

For the foregoing reasons and those set forth in his original Brief and Argument, Alvin Brown, defendant-appellant, respectfully requests that this Court vacate his Class X sentence and remand the matter for resentencing in the extended-term Class 2 sentencing range, or, alternatively, vacate the denial of his post-plea motion and remand the case for: (1) the filing of a valid Rule 604(d) certificate; (2) the opportunity to file a new post-plea motion; and (3) a new motion hearing.

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 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 12 pages.

/s/Christopher McCoy
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No. 129585

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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 March 19, 2024, 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 Elgin, 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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