No. 122598

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellee, -vs- NELSON A. YOUNG Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-15-0575. There on appeal from the Circuit Court of the Seventh Judicial Circuit, Morgan County, Illinois, No. 05-CF-136. Honorable David R. Cherry, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

POINT AND AUTHORITIES

Nelson Young is entitled to an additional 183 days of credit for time served, and this Court should amend the mittimus to reflect the accurate total of days that he spent in presentence custody.

NATURE OF THE CASE

Nelson A. Young, appeals to this Court from a final judgment denying his post-conviction petition.

No is issue is raised challenging the pleadings.

ISSUE PRESENTED FOR REVIEW

Whether Nelson Young is entitled to an additional 183 days of credit for time served, and whether this Court should amend the mittimus to reflect the accurate total of days that he spent in presentence custody.

JURISDICTION

On October 27, 2014, Nelson A. Young filed a *pro se* petition for relief from judgment. (C. III, 281-289). On June 24, 2015, the trial court issued its final judgment denying the *pro se* petition. (C. III, 322). On July 13, 2015, Nelson Young filed a timely notice of appeal. (C. III, 324).

On July 14, 2017, the Fourth District of the Illinois Appellate Court issued its order vacating the trial court's order and remanding with directions. *People v. Young*, 2017 IL App (4th) 150575-U, ¶ 1. However, the Fourth District declined to address a claim for sentence credit which Young had raised for the first time on appeal. *Young*, 2017 IL App (4th) 150575-U, ¶¶ 42-44.

On August 17, 2017, Young filed a petition for leave to appeal. On November 22, 2017, this Court granted Young's petition for leave to appeal.

Jurisdiction therefore lies in this Court pursuant to Article VI, Section 6, of the Illinois Constitution, and Supreme Court Rules 302, 315, 606, 612.

STATUTES AND RULES INVOLVED

730 ILCS 5/5-8-7(b) (eff. Jan 1, 2005 to May 31, 2008):

> "(b) The offender shall be given credit on the determinate sentence or maximum term and the minimum period of imprisonment for time spent in custody as a result of the offense for which the sentence was imposed, at the rate specified in Section 3-6-3 of this Code. Except when prohibited by subsection (d), the trial court may give credit to the defendant for time spent in home detention, or when the defendant has been confined for psychiatric or substance abuse treatment prior to judgment, if the court finds that the detention or confinement was custodial."

725 ILCS 5/110-14(a) (eff. Jan 1, 2005 to Dec. 31, 2017):

> "(a) Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine."

730 ILCS 5/5-4-1(e)(4) (eff. Sept. 11, 2005 to Aug. 20, 2007):

> "(e) The clerk of the court shall transmit to the department, agency or institution, if any, to which the defendant is committed, the following:
>
> * * *
>
> (4) the number of days, if any, which the defendant has been in custody and for which he is entitled to credit against the sentence, which information shall be provided to the clerk by the sheriff"

725 ILCS 5/104-24 (eff. July 1, 1997):

> "Time spent in custody pursuant to orders issued under Section 104-17 or 104-20 or pursuant to a commitment to the Department of Human Services following a finding of unfitness or incompetency under prior law, shall be credited against any sentence imposed on the defendant in the pending criminal case or in any other case arising out of the same conduct."

Ill. S.Ct. R. 383 (eff. July 1, 2017):

> "(a) A motion requesting the exercise of the Supreme Court's supervisory authority shall be supported by explanatory suggestions and shall contain or have attached to it the lower court records or other pertinent material that will fully present the issues, authenticated as required by Rule 328."

STATEMENT OF FACTS

Pre-Trial

On July 20, 2005, Nelson Young was arrested. (C. I, 13). The State charged him with first degree murder, alleging that Young had stabbed his girlfriend, Eva Mae Davis, killing her, knowing that his act created a strong probability of death or great bodily harm. (C. I, 11); 720 ILCS 5/9-1(a)(2) (2005).

On December 13, 2005, after undergoing an examination with Dr. Terry Killian, a fitness hearing was held in court and Young was found unfit to stand trial. (R. IV, 37-40, 53-55; C. I, 38; C. I, 170, brown envelope). The court transferred Young temporarily into the custody of the Department of Human Services (DHS) for treatment. (R. IV, 55; C. I, 50-51).

On January 20, 2006, Young was returned to the Morgan County Jail. (C. I, 56). At a hearing on January 24, 2006, the court indicated it had received a report from DHS that Young had been transferred back to the county jail and the court ordered Dr. Killian to re-evaluate Young in preparation for a second fitness hearing. (C. I, 3; R. IV, 75-78) (presumably the document at C. I, 54 is the DHS report the court was referring to).

On March 14, 2006, a second fitness hearing was conducted and Young was found fit to stand trial. (R. IV, 86-88). Based on the record, at this point in the pre-trial phase, Young had been in the custody of the Morgan County Jail since January 20, 2006. (C. I, 56; R. IV, 75-78). However, on March 22, 2006, the court issued a written order releasing Young from the custody of DHS to the county jail. (C. I, 65).

On April 3, 2006, counsel filed a written motion for hospitalization. (C. I, 69). In the motion, counsel indicated that Young had tried to commit suicide on March 30, 2006, by hanging himself and ingesting pills. (C. I, 69-70).

On April 6, 2006, the court issued a written order transferring Young back into the custody of DHS. (C. I, 73). The order stated Young needed further medical treatment which could not be provided at the county jail facilities. (C. I, 73). On April 20, 2006, the court issued another written order which stated:

> "State's Attorney Reif and Attorney Piper have informed the Court that the Department of Human Services will not provide treatment to the Defendant at this time. The Morgan County Detention Facility has made certain accommodations to provide for the Defendant; therefore the order of April 6, 2006, is vacated." (C. I, 84-85).

At some point Young was transferred back into the custody of the Morgan County Jail after the court issued its written order on April 6, 2006. (C. I, 73) (The record is unclear on when or if Young was transferred to DHS, but he was not released from custody during this time. See C. I, 170, brown envelope, presentence investigation report (PSI) pages 3, 9).

Jury Trial & Direct Appeal

Following a jury trial, Young was convicted of first degree murder and on August 22, 2006, was sentenced to 40 years in prison. (R. X, 15; C. I, 171). Young was awarded 215 days of credit for time already served. (R. X, 15; C. I, 171). On direct appeal, the Fourth District affirmed the conviction and sentence. *People v. Young*, 381 Ill.App.3d 595, 600-03 (4th Dist. 2008).

Post-Conviction Petition & Appeal

In 2009, Young filed a *pro se* post-conviction petition which the court dismissed at the first stage. (C. I, 233-238; C. II, 255). Young appealed, and in 2011, the Fourth District affirmed. (C. III, 279); *People v. Young*, No. 4-09-0486, page 7 (unpublished order under Supreme Court Rule 23); (R. VIII, 126-221).

Petition For Relief From Judgment & Appeal

In October 2014, Young *pro se* filed a written document titled: "Petitioner's Motion/Request for a Fitness Hearing Pursuant to 735 ILCS 5/2-1401(F) [2014], Namely, A Relief of Judgment Petition" (emphasis deleted) (C. III, 281-289). Without giving any admonishments, the circuit court treated Young's section 2-1401 petition as a post-conviction petition and dismissed it. *People v. Young*, 2017 IL App (4th) 150575-U, ¶ 27.

Young appealed arguing remand was necessary for proper re-characterization admonishments pursuant to *People v. Pearson*, 216 Ill.2d 58 (2005). Young also raised a claim– for the first time– that he was entitled to an additional 183 days of credit for time spent in presentence custody. *Young*, 2017 IL App (4th) 150575-U, ¶ 1. The Fourth District agreed that remand was necessary to comply with *Pearson*, but held it lacked jurisdiction to reach the merits of Young's claim for presentence custody credit. *Id.* ¶¶ 38, 42-44, relying on *People v. Nelson*, 2016 IL App (4th) 140168, and *People v. Morrison*, 2016 IL App (4th) 140712. The Fourth District opined that:

> "[i]nstead, as noted in [*Nelson* and *Morrison*], 'defendant may petition the trial court to correct the simple error in arithmetic, as trial courts retain jurisdiction to correct nonsubstantial matters of inadvertence or mistake.' " *Young*, 2017 IL App (4th) 150575-U, ¶ 44, quoting *Morrison*, 2016 IL App (4th) 140712, ¶ 21; *Nelson*, 2016 IL App (4th) 140168, ¶¶ 36-38.

Young filed a petition for leave to appeal asking this Court to address his claim for presentence custody credit. This Court granted leave to appeal on November 22, 2017.

ARGUMENT

Nelson Young is entitled to an additional 183 days of credit for time served, and this Court should amend the mittimus to reflect the accurate total of days that he spent in presentence custody.

As of now, Nelson Young will spend an extra six months in prison because of a miscalculation in the amount of days he spent in presentence custody. *People v. Young*, 2017 IL App (4th) 150575-U, ¶¶ 42-44. A prisoner is entitled to credit against his sentence for every day he spends in custody prior to the day he is sentenced. 730 ILCS 5/5-4.5-100(b) (2017) (herein after referred to as "liberty" sentence credit). He is also entitled to $5-per-day credit against qualifying fines for every one of those days. 725 ILCS 5/110-14 (2017) (herein after referred to as *per diem* credit or section 110-14 credit). Naturally, because both types of sentence credit are alike, each has been treated similarly by this Court. *People v. Woodard*, 175 Ill.2d 435, 457 (1998); *People v. Caballero*, 228 Ill.2d 79, 84 (2008). Both are mandatory in every criminal case, immune to the normal rules of forfeiture and waiver, lack a statutory deadline for seeking the credit, and are simple and ministerial in computation. *Caballero*, 228 Ill.2d 83-89. A claim for liberty sentence credit, like a claim for monetary *per diem* credit, can be made at any time and at any stage of court proceedings. *People v. Truesdell*, 2017 IL App (3d) 150383, ¶ 19, citing *Caballero*, 228 Ill.2d at 88. So long as the basis for granting the claim for either credit is clear and available from the record, an appellate court should grant the relief requested in the interests of an orderly administration of justice. *Truesdell*, 2017 IL App (3d) 150383, ¶ 19; *Caballero*, 228 Ill.2d at 88. Accordingly, this Court should amend the mittimus so that it accurately reflects the total amount of days that Young spent in presentence custody, which is 398 days. (C. I, 171).

Standard Of Review & General Authorities

"The interpretation of state statutes is a question of law, which this [C]ourt reviews *de novo*." *Caballero*, 228 Ill.2d at 82, citing *People v. Harris*, 224 Ill.2d 115, 123 (2007). The Unified Code of Corrections provides that an offender "shall be given credit * * * for time spent in custody as a result of the offense for which the sentence was imposed[.]" 730 ILCS 5/5-4.5-100(b) (eff. July 1, 2009). This Court "reviews whether a defendant should receive presentence custody credit against his sentence under the *de novo* standard of review." *People v. Clark*, 2014 IL App (4th) 130331, ¶16; *People v. Robinson*, 172 Ill.2d 452, 457 (1996). Section 5-4.5-100(b) was created in 2009, replacing virtually identical language in section 5-8-7(b), the old statute for liberty credit. See 730 ILCS 5/5-8-7(b) (2008). Because the analysis of courts in cases involving the older section 5-8-7(b) applies just as well to the newer section 5-4.5-100(b), the two versions of the liberty credit statute are interchangeable. See *e.g.*, *Clark*, 2014 IL App (4th) 130331, ¶21 (treating analysis of section 5-4.5-100(c) and the obsolete section 5-8-7(c), which also involve identical language, to be interchangeable).

"This [C]ourt has stated that the purpose of the 'credit-against-sentence' provision contained in section 5–8–7(b) is to ensure that defendants do not ultimately remain incarcerated for periods in excess of their eventual sentences." *People v. Latona*, 184 Ill.2d 260, 270 (1998), citing *People v. Ramos*, 138 Ill.2d 152, 159 (1990), citing *People v. Hughes*, 167 Ill.App.3d 265 (3d Dist. 1988).

The Post-Conviction Hearing Act (725 ILCS 5/122–1 *et seq.* (2014)) provides a means by which a defendant may collaterally attack his conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223

Ill.2d 458, 471 (2006), citing *People v. Whitfield*, 217 Ill.2d 177, 183 (2005). To demonstrate entitlement to post-conviction relief, a defendant must show that he has suffered a substantial deprivation of federal or state constitutional rights in the proceedings that produced the conviction or sentence being challenged. *Pendleton*, 223 Ill.2d at 471, citing *Whitfield*, 217 Ill.2d at 183.

A Brief History

The legislature has mandated that a prisoner of the State shall receive credit against his sentence for time spent in presentence custody. 730 ILCS 5/5-8-7(b). A trial court will usually calculate the number of days already served and inform the Department of Corrections of that number by writing it, or the custody dates, on the sentencing order (also called a mittimus). See *Latona*, 184 Ill.2d at 280 ("Judgments and mittimuses are prepared every day directing the Department to confine persons in correctional facilities and specifying the sentence credit due them."). Calculation mistakes are often made, and as a result, many prisoners serve part of their sentences twice. Here, Young is being required to spend an additional six months in prison, above and beyond his sentence, even though the miscalculation could be easily fixed, and has already been brought to the attention of a reviewing court. *Young*, 2017 IL App (4th) 150575-U, ¶¶ 42-44.

Inaccurate totals of creditable days that are written on the mittimus can go unnoticed at the trial level and on direct appeal. See *e.g.*, *People v. Nelson*, 2016 IL App (4th) 140168, ¶ 27. As a result, claims for liberty credit, like claims for *per diem* credit, are sometimes raised for the first time on appeal in collateral proceedings. Some appellate courts have called this process "piggy-backing." See *e.g.*, *People v. Griffin*, 2017 IL App (1st) 143800, ¶ 25, *petition for leave to appeal*

granted (November 22, 2017) ("*Caballero*, in essence, stands for the proposition that a defendant may 'piggyback' a section 110–14 claim onto any properly filed appeal, even if the claim is unrelated to the grounds for that appeal.").

Historically, appellate courts have been split on whether to address these piggy-backed claims for liberty credit. See *Caballero*, 228 Ill.2d at 83-88, discussing *People v. Wren*, 223 Ill.App.3d 722 (5th Dist. 1992) (addressing liberty credit), *People v. Andrews*, 365 Ill.App.3d 696 (3d Dist. 2006) (addressing liberty credit), *People v. Brown*, 371 Ill.App.3d 972 (1st Dist. 2007) (addressing liberty credit), *People v. Bates*, 179 Ill.App.3d 705 (4th Dist. 1989) (not addressing liberty credit), *People v. Uran*, 196 Ill.App.3d 293 (3d Dist. 1990) (not addressing liberty credit), *People v. Reed*, 335 Ill.App.3d 1038 (4th Dist. 2003) (not addressing liberty credit); 730 ILCS 5/5-8-7(b).

The stated reason for addressing liberty credit has varied as well. First, appellate courts, in the interest of an orderly administration of justice, have treated a claim for liberty credit as a motion to amend the mittimus, which can be made at any time. *E.g.*, *People v. White*, 357 Ill.App.3d 1070, 1073-76 (3d Dist. 2005); *People v. Harper*, 387 Ill.App.3d 240, 244 (1st Dist. 2008). Second, other reviewing courts have held a claim for liberty credit could be addressed at any time because it is a void sentence. *E.g.*, *People v. Roberson*, 212 Ill.2d 430, 440 (2004). Third, courts have mentioned the power of a reviewing court to modify a mittimus or sentencing order pursuant to Supreme Court Rules. See *Andrews*, 365 Ill.App.3d at 700, citing Ill. S.Ct. R. 615(b). And sometimes a reviewing court will mention all three rationales. See *e.g.*, *People v. Flores*, 378 Ill.App.3d 493, 497 (2d Dist. 2008) (looking to Ill. S.Ct. R. 366(a)(5), the void-sentence rule, and the power to amend a mittimus at any time).

In 2008, *Caballero* made clear that a claim for *per diem* credit "may be raised at any time and at any stage of court proceedings[.]" *Caballero*, 228 Ill.2d at 88. Subsequently, appellate courts began addressing claims for liberty credit, raised for the first time in a collateral appeal, by citing to *Caballero*. See *e.g.*, *Truesdell*, 2017 IL App (3d) 150383, ¶ 19; *People v. Purcell*, 2013 IL App (2d) 110810, ¶ 8; *People v. Ross*, 2015 IL App (3d) 130077, ¶22. In 2015, this Court abolished the void-sentence rule, thereby eliminating one of the previous rationales for addressing "piggy-backed" claims for liberty credit. *People v. Castleberry*, 2015 IL 116916, ¶ 1; *People v. Price*, 2016 IL 118613, ¶ 27 (holding the abolition of the void-sentence rule applies retroactively). Since *Castleberry*, the Fourth District has declined to address claims for liberty credit when raised for the first time in a collateral appeal. *Nelson*, 2016 IL App (4th) 140168, ¶¶32-39; *People v. Morrison*, 2016 IL App (4th) 140712, ¶¶13-21; *Young*, 2017 IL App (4th) 150575-U, ¶¶ 41-44. Young contends that, just as a claim for monetary *per diem* credit can be made at any time, and at any stage of court proceedings, so can a claim for liberty sentence credit. See *Caballero*, 228 Ill.2d at 88; *Truesdell*, 2017 IL App (3d) 150383, ¶ 19.

Nelson Young Is Entitled to An Additional 183 Days Of Credit

Here, Nelson Young was arrested and taken into custody on July 20, 2005, and he was sentenced on August 22, 2006. (R. X, 15; C. I, 13, 171) (C. I, 170, brown envelope, presentence investigation report (PSI) pages 3, 9). The total number of days from July 20, 2005, to August 21, 2006, or the day before the sentencing hearing, was 398. See *People v. Williams*, 239 Ill.2d 503 (2011) (day of sentencing not counted towards credit). The court, however, awarded 215 days of liberty sentence credit. (R. X, 15; C. I, 171).

"The Illinois Supreme Court has defined 'custody' for purposes of sentencing credit as 'the legal duty to submit' to legal authority and not actual physical confinement." *In re Christopher P.*, 2012 IL App (4th) 100902, ¶ 43, quoting *People v. Beachem*, 229 Ill.2d 237, 252 (2008). If a defendant is found unfit to stand trial and is hospitalized, he shall be given credit for time spent in the hospital pursuant to the finding of unfitness. *People v. Williams*, 23 Ill.App.3d 127, 130 (5th Dist. 1974). Most importantly, the Code of Criminal Procedure states:

> "Time spent in custody *** pursuant to a commitment to the Department of Human Services following a finding of unfitness or incompetency under prior law, shall be credited against any sentence imposed on the defendant in the pending criminal case or in any other case arising out of the same conduct." 725 ILCS 5/104-24 (2005).

Even though Young spent time in the custody of the Department of Human Services on two separate occasions, he was never released from actual physical confinement. Thus, Young is entitled to an additional 183 days of liberty sentence credit. (R. X, 15; C. I, 13, 171) (C. I, 170, brown envelope, presentence investigation report (PSI) pages 3, 9).

In 2014, Young filed a *pro se* petition for relief from judgment pursuant to 735 ILCS 5/2-1401 (2014), which alleged his trial counsel provided ineffective assistance by failing to present certain evidence. (C. III, 281-289). The trial court treated the section 2-1401 petition as a post-conviction petition, and denied it. (C. III, 290-293). Young appealed arguing, in part, that remand was necessary for proper re-characterization admonishments pursuant to *People v. Pearson*, 216 Ill.2d 58 (2005), and *People v. Shellstrom*, 216 Ill.2d 45, 57 (2005). *Young*, 2017 IL App (4th) 150575-U, ¶ 1. Young also raised a claim– for the first time– that he was entitled to an additional 183 days of credit for time served in presentence

custody. *Young*, 2017 IL App (4th) 150575-U, ¶¶ 1, 42-44. The Fourth District agreed that remand was necessary to comply with *Pearson*, but held it lacked jurisdiction to reach the merits of Young's claim for liberty sentence credit. *Id.* ¶¶ 38, 42-44. The Fourth District erred because Young's claim for liberty sentence credit should have been addressed pursuant to *Caballero*. See *Truesdell*, 2017 IL App (3d) 150383, ¶ 19; *Caballero*, 228 Ill.2d at 88.

This Court should amend the mittimus to reflect the accurate amount of days Young spent in presentence custody, which is 398 days. See *Truesdell*, 2017 IL App (3d) 150383, ¶ 19 (holding *Caballero* "endorsed the position that the appellate court may grant sentence credit to a defendant on an appeal from the denial of a postconviction petition, as it is a ministerial act that favors the orderly administration of justice"); see also *People v. Buffkin*, 2016 IL App (2d) 140792, n. 2 (noting an application for sentence credit for time served is not a request to reduce the sentence but a motion to amend the mittimus which may be made at any time).

Liberty Sentence Credit Can Be Applied For At Any Time

Although Young did not raise a challenge to his amount of liberty sentence credit in his *pro se* petition, this Court can reach the merits of Young's claim because doing so is "in the interests of an orderly administration of justice." *Caballero*, 228 Ill.2d at 88. In *Caballero*, this Court held that a claim for *per diem* monetary credit against fines for time served in custody "may be raised at any time and at any stage of court proceedings, even on appeal in a postconviction proceeding." *Caballero*, 228 Ill.2d at 88.

Caballero's analysis was informed by several persuasive lower court decisions where liberty sentence credit was granted for the first time on appeal in a post-conviction proceeding. *See Caballero*, 228 Ill.2d at 84-87, citing *Wren*, 223 Ill.App.3d at 731, *Andrews*, 365 Ill.App.3d at 698-701, *Brown*, 371 Ill.App.3d at 985. In *Caballero*, this Court highlighted the decisions in *Wren* and *Andrews* which awarded liberty sentence credit "for the first time on appeal in a postconviction proceeding based on the rationale of a 'ministerial act' and the 'interests of an orderly administration of justice.' " *Caballero*, 228 Ill.2d at 88. Using this reasoning for monetary *per diem* credit, *Caballero* then held that when "the basis for granting the application of the defendant is clear * * * the appellate court may, in the 'interests of an orderly administration of justice,' grant the relief requested." *Caballero*, 228 Ill.2d at 88. Following *Caballero*, several appellate court districts have used *Caballero's* reasoning to grant liberty sentence credit for time served in presentence custody when that credit is sought for the first time on appeal in a collateral proceeding. See *Truesdell*, 2017 IL App (3d) 150383, ¶ 19; *Purcell*, 2013 IL App (2d) 110810, ¶8; *Ross*, 2015 IL App (3d) 130077, ¶ 22.

The Third District noted in *Andrews* that:

> "The statute governing credit for presentence incarceration states that the offender shall be given credit against his prison sentence for time spent in custody as a result of the offense for which the sentence was imposed. [Citation.] *** Moreover, we have the authority under Illinois Supreme Court Rule 615(b)(1) [citation], to modify the trial court's order to correct what amounts to a clerical error to give the defendant credit for all his presentence custody." *Andrews*, 365 Ill.App.3d at 699.

For this reason—and despite the fact that the defendant there improperly raised the issue in a post-conviction petition—the Third District decided that " '*in the interests of an orderly administration of justice*' [citation,] we will treat [the] defendant's request as a motion to amend mittimus and consider it because an

amended mittimus may be issued at any time." (Emphasis added.) *Andrews*, 365 Ill.App.3d at 699-700; see *Caballero*, 228 Ill.2d at 88 (holding that "if, as in this case, the basis for granting the application of the defendant is clear and available from the record, the appellate court may, in the 'interests of an orderly administration of justice,' grant the relief requested").

In this case, the proper amount of Young's liberty sentence credit was clear from the record. Young was taken into custody on July 20, 2005, and he was sentenced on August 22, 2006. (R. X, 15; C. I, 13, 171) (C. I, 170, brown envelope, presentence investigation report (PSI) pages 3, 9). The total number of days from July 20, 2005, to August 21, 2006, or the day before the sentencing hearing, was 398. The trial court, however, only awarded 215 days of liberty sentence credit. (R. X, 15; C. I, 171). Thus, Young is entitled to an additional 183 days.

As contemplated in *Caballero*, "the basis for granting the application of the defendant is clear[.]" *Caballero*, 228 Ill.2d at 88. Further, it is proper to amend a mittimus to correct a credit amount because a mittimus can be amended at any time. *Wren*, 223 Ill.App.3d at 731. This Court should order that Young's mittimus be amended to reflect 398 days of credit instead of the 215 days he received.

Here, however, the Fourth District refused to apply *Caballero* and award Young his additional liberty sentence credit. *Young*, 2017 IL App (4th) 150575-U, ¶ 1. Instead, the Fourth District relied on its previous holding in *Nelson*, where it denied liberty sentence credit even though it expressly acknowledged that the defendant was entitled to the additional credit for time he spent in presentence custody. *Nelson*, 2016 IL App (4th) 140168, ¶29, Further, the Fourth District relied on *People v. Morrison*, 2016 IL App (4th) 140712, ¶ 15, where it rejected the aforementioned opinion in *Andrews* (which was cited favorably by *Caballero*) that the reviewing court had the power under Illinois Supreme Court Rule 615(b)(1)

to correct a clerical error involving sentence credit. *Morrison*, 2016 IL App (4th) 140712, ¶15; citing *Andrews*, 365 Ill.App.3d at 698-699.

The Fourth District's rationale for treating *per diem* monetary credit more favorably than liberty credit for days spent in jail is based upon the phrase "upon application of the defendant," that appears in the *per diem* credit statute, but not in the statute governing credit for time served. *Nelson*, 2016 IL App (4th) 140168, ¶¶32-38; citing 725 ILCS 5/110-14; 730 ILCS 5/5-8-7(b). The Fourth District reads *Caballero* as if *Caballero* relied solely on the above phrase contained in section 110-14. *Nelson*, 2016 IL App (4th) 140168, ¶¶32-38; citing *Caballero*, 228 Ill.2d at 87-88.

The Fourth District's narrow interpretation of the reasoning in *Caballero* is incomplete and thus unpersuasive. Another factor which informed this Court's holding in *Caballero* was that section 110-14 imposed no time deadline for defendants to seek *per diem* monetary credit. *Caballero*, 228 Ill.2d at 87-88. Likewise, the credit for time served statute does not specify a deadline for granting credit. 730 ILCS 5/5-4.5-100(b); 730 ILCS 5/5-8-7(b). The statute provides: "[t]he offender *shall be given credit* * * * for time spent in custody as a result of the offense for which the sentence was imposed[.]" (Emphasis added) 730 ILCS 5/5-8-7(b) (2005). This factor weighs in favor of treating liberty credit for time served and *per diem* monetary credit in the same way.

Further, *Caballero* also reasoned that "'[g]ranting the [*per diem*] credit is a simple ministerial act that will promote judicial economy by ending any further proceedings over the matter.'" *Caballero*, 228 Ill.2d at 88, quoting *Woodard*, 175 Ill.2d at 456-457, quoting *People v. Scott*, 277 Ill.App.3d 565, 566 (3d Dist. 1996).

Caballero then observed that, "[t]he *Wren* case and the *Andrews* case each granted a claim for sentencing credit raised for the first time on appeal in a postconviction proceeding based on the rationale of a 'ministerial act' and the 'interests of an orderly administration of justice.'" *Caballero*, 228 Ill.2d at 88. Thus, *Caballero* cited *Wren* and *Andrews* with tacit approval in explaining its reasoning for allowing *per diem* credit.

The ministerial nature of computing liberty credit for time served and serving the interests of an orderly administration of justice are also factors that contradict the Fourth District's position, and weigh in favor of treating liberty credit for time served and *per diem* monetary credit in the same way. The Fourth District's differing treatment of the two types of credit does not account for the ministerial character of sentence credit computation. As a matter of logic, if granting credit for *per diem* monetary credit against fines in collateral appeals is a "ministerial act" that is in the "interests of an orderly administration of justice" as this Court held in *Caballero*, then granting actual credit for time served in jail awaiting trial is also a ministerial act that is in the interests of an orderly administration of justice. *Caballero*, 228 Ill.2d at 88. To apply monetary credit, one counts the days of time served, multiplies by $5, and then deducts that credit total from applicable fines. 725 ILCS 5/110-14. Applying credit for time served involves merely counting the number of days. Computing credit for time served involves fewer ministerial steps than does applying *per diem* monetary credit.

Aside from being a generally simple computation, awarding the correct liberty credit for time already served in jail against prison sentences affects significant liberty interests, unlike the monetary *per diem* credit against

fines."[D]ouble jeopardy requires that a defendant receive credit against his sentence for any time already served." *People v. Inman*, 2014 IL App (5th) 120097, ¶33, citing *North Carolina v. Pearce*, 395 U.S. 711, 718-19 (1969); U.S. Const., amend. V; Ill. Const. 1970, art. I, § 10. Unlike a prisoner who merely did not receive enough monetary credit against his fines, a prisoner who was under credited for time served will have to serve at least some part of his sentence twice.

A prisoner under credited for time served will face multiple punishments for the same offense, and his total punishment will exceed that authorized by the legislature. 730 ILCS 5/5-8-7(b); See *Inman*, 2014 IL App (5th), 120097, ¶ 32, citing *Jones v. Thomas*, 491 U.S. 376, 380-81 (1989). The double jeopardy clause prohibits this type of sentence. See *Inman*, 2014 IL App (5th), 120097, ¶ 32, citing *Jones* , 491 U.S. at 380-81 (1989). "No person shall * * * be twice put in jeopardy for the same offense." Ill. Const. 1970, art. I, § 10. A prisoner who is under credited for time served receives a punishment which is unconstitutional. Unlike the failure to award the proper amount of *per diem* credit, which merely results in non-compliance with a statute, the failure to award liberty credit for time served is a violation of both our federal and state constitutions. See U.S. Const., amend. V; Ill. Const. 1970, art. I, § 10.

Moreover, the Fourth District's position is contrary to *Caballero's* rationale to allow requests for *per diem* monetary credit in collateral appeals to "promote judicial economy" in cases where "the basis for granting the application of the defendant is clear and available from the record[.]" *Caballero*, 228 Ill.2d at 88. In this case, as in *Caballero*, the interests of judicial economy are served by granting the credit for time served to which a defendant is clearly entitled, thus ending

the matter. This is in contrast to the Fourth District's approach, which would encourage piecemeal additional litigation of credit claims that could have been settled sooner.

In short, the Fourth District's reading of *Caballero* unpersuasively ignores most of the reasons discussed by this Court in that case. This Court also discussed the lack of a statutory deadline for seeking credit, the simple and ministerial nature of computing credit, and the promotion of judicial economy and the orderly administration of justice where eligibility for the credit is clear from the record. *Caballero*, 228 Ill.2d at 83-88. All of those factors contradict the Fourth District's conclusion, and favor addressing liberty sentence credit claims for time already served in the same manner as the monetary claims at issue in *Caballero*.

Further, the Fourth District's rationale also fails to properly account for the fact that this Court has long treated claims for credit for time served similarly to claims for *per diem* monetary credit under section 110-14. In *Woodard*, this Court made it clear that because section 110-14 is a mandatory statute, "the 'normal rules' of waiver do not apply" to claims for *per diem* monetary credit against fines. *Woodard*, 175 Ill.2d at 457. This Court then added, "[n]otably, the mandatory credit in section 5-8-7(b) [the former version of the sentence credit statute] * * * has been treated similarly." *Woodard*, 175 Ill.2d at 457. The normal rules of waiver do not apply to requests for sentence credit, whether for time served or for *per diem* monetary credit against fines. *Woodard*, 175 Ill.2d at 457. The Fourth District's disparate treatment of the two similarly applied types of credit is also contrary to *Woodard*.

Lastly, in this case, as in *Nelson* and *Morrison*, while refusing to address a liberty credit claim raised for the first time in a collateral appeal, the Fourth District suggested that Young was not left without remedy because he could still seek the credit at the trial court level. *Young*, 2017 IL App (4th) 150575-U, ¶ 44, citing, *Morrison*, 2016 IL App (4th) 140712, ¶ 21, citing *Nelson*, 2016 IL App (4th) 140168, ¶ 39.

> "Defendant is not, however, left without remedy. He may petition the trial court to correct the simple error in arithmetic, as trial courts retain jurisdiction to correct nonsubstantial matters of inadvertence or mistake." *Nelson*, 2016 IL App (4th) 140168, ¶ 39, citing *Baker v. Department of Corrections*, 106 Ill.2d 100 (1985).

Despite the Fourth District's repeated suggestion, it more recently held that even a trial court lacks jurisdiction to fix an inaccurate amount of credit on a sentencing order (mittimus), more than 30 days after entry. *People v. Coleman*, 2017 IL App (4th) 160770, ¶¶ 18-23. Thus, the Fourth District's suggestion to Young, Mr. Nelson, and Mr. Morrison, that they were not "left without a remedy" rings hollow. See *e.g.*, *Nelson*, 2016 IL App (4th) 140168, ¶ 39; but see *Coleman*, 2017 IL App (4th) 160770, ¶¶ 18-23.

In conclusion, it is clear from the record that Young had served 398 days in jail prior to sentencing, but was only granted credit for 215 days. (C. I, 171). This Court should grant him the credit to which he is entitled. See *Caballero*, 228 Ill.2d at 88.

Alternative Means To Address Nelson Young's Claim

Alternatively, if this Court holds *Caballero* does not provide the grounds for addressing claims for liberty credit *at any time*, then this Court should amend its own rules to allow a prisoner a means, without time constraints, of correcting

his sentencing order if it inaccurately reflects the total amount of presentence custody credit. See *Castleberry*, 2015 IL 116916, ¶ 28; Ill. S.Ct. R. 3 (eff. July 1, 2017). Typically, rule amendments begin in this Court's Rules Committee. Ill. S.Ct. R. 3(a)(1). However, "[t]he Supreme Court reserves the prerogative of departing from the procedures of this rule." Ill. S.Ct. R. 3(a)(2).

A narrow rule which treated claims for liberty sentence credit the same as monetary *per diem* credit, by allowing a claim for either to be made at *any* time and at *any* stage of court proceedings, so long as the credit was clear and available from the record, would be proper. Allowing either claim to be raised for the first time in a collateral appeal would further judicial economy by ending the matter in the context of a court of review. Not requiring a separate cause of action to be filed in the trial court would also diminish piecemeal litigation of an issue that is implicated in every criminal case. Moreover, the fact that liberty credit is implicated in every criminal case means fairness would be furthered by allowing prisoners the ability to correct ministerial mistakes that effect significant liberty interests. Fairness would also be promoted by not favoring money credit over liberty credit which is fundamentally more important.

Additionally, the integrity of the judicial system would be strengthened by ensuring that each prisoner would not serve part of his sentence twice, or he would at least have a remedy to prevent him from serving such an illegal sentence. Finally, this narrow rule would align with the statute which sets out a *ministerial* process for enforcing the credit computation, apart from the discretion of the governmental actors, *i.e.*, trial judge, sheriff, clerk, and the DOC. See *Cowper v. Nyberg*, 2015 IL 117811, ¶ 20 (the duties prescribed in 730 ILCS 5/5-4-1(e)(4) (2016), are "ministerial" and do not require the "exercise of discretion").

> "The clerk of the court shall transmit to the department, * * * the number of days, if any, which the defendant has been in custody and for which he is entitled to credit against the sentence, which information shall be provided to the clerk by the sheriff[.]" 730 ILCS 5/5-4-1(e)(4) (2006).

As mentioned in a footnote in *Buffkin*, an application for liberty sentence credit for time served is not a request to reduce the sentence but a ministerial motion to amend the mittimus which may be made *at any time*. *Buffkin*, 2016 IL App (2d) 140792, n. 2. This Court should amend its rules to make clear that a claim for liberty sentence credit can be made at any time and at any stage of court proceedings, even on appeal in a collateral proceeding. See *Castleberry*, 2015 IL 116916, ¶ 28; Ill. S.Ct. R. 3: see also *In re B.L.S.*, 202 Ill.2d 510, 519 (2002) (holding the credit-against-sentence statute (730 ILCS 5/5-8-7(b)) applied to juveniles); *In re A.G.*, 195 Ill.2d 313, 319 (2001) (holding compliance with Ill. S.Ct. R. 604(d) is required in juvenile proceedings).

Lastly, if this Court declines to address Young's claim for liberty credit pursuant to *Caballero*, or by amending its own rules, then this Court should use its supervisory authority to grant Young the 183 additional days of liberty sentence credit to which he is clearly entitled. Ill. S.Ct. R. 383 (eff. July 1, 2017); Ill. Const. 1970, art. VI, § 16.

CONCLUSION

For the foregoing reasons, Nelson A. Young, defendant-appellant, respectfully requests that this Court correct the mittimus to reflect that he is entitled to 398 days of presentence custody credit.

Respectfully submitted,

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Deputy Defender

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CERTIFICATE OF COMPLIANCE

I, Jason B. Jordan, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) 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 24 pages.

/s/Jason B. Jordan
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ARDC No. 6319268
Assistant Appellate Defender

No. 122598

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellee, -vs- NELSON A. YOUNG Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-15-0575. There on appeal from the Circuit Court of the Seventh Judicial Circuit, Morgan County, Illinois, No. 05-CF-136. Honorable David R. Cherry, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601, mglick@atg.state.il.us, cc: twhatley-conner@atg.state.il.us, jescobar@atg.state.il.us, lbendik@atg.state.il.us; edusza@atg.state.il.us

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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 December 22, 2017, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Natasha Wallace
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APPENDIX TO THE BRIEF

Nelson A. Young No. 122598

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Supplement to Record

Fines and Fees Sheet filed 03/06/2017 - Blue-backed (1 page)

2017 IL App (4th) 150575-U

NO. 4-15-0575

FILED
July 14, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Morgan County
NELSON A. YOUNG,	)	No. 05CF136
Defendant-Appellant.	)	
	)	Honorable
	)	David R. Cherry,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred by failing to sufficiently admonish defendant under *People v. Pearson*, 216 Ill. 2d 58, 833 N.E.2d 827 (2005), before recharacterizing his *pro se* petition as a successive petition for postconviction relief (725 ILCS 5/122-1(f) (West 2014)). The appellate court vacated the dismissal of that petition and remanded with directions. The court found it was without jurisdiction to address defendant's claim of entitlement to additional sentence credit first raised on appeal of the dismissal of the postconviction petition and directed the trial court to vacate fines imposed by the circuit clerk.

¶ 2 After a July 2006 trial, the jury found defendant, Nelson A. Young, guilty of first degree murder. The trial court sentenced him to 40 years in prison. We affirmed defendant's conviction on direct appeal. *People v. Young*, 381 Ill. App. 3d 595, 887 N.E.2d 649 (2008).

¶ 3 In April 2009, defendant *pro se* filed a petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2008)), arguing ineffective assistance of trial counsel. The trial court summarily dismissed the petition, and we affirmed. *People v. Young*, No. 4-09-0486 (2011) (unpublished order under Supreme Court Rule

23).

¶ 4 In October 2014, defendant *pro se* filed a pleading labeled as a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)), arguing that (1) his conviction violated due process because he stood trial while unfit and (2) trial counsel provided ineffective assistance of counsel. The trial court treated defendant's petition as a successive petition for postconviction relief and eventually dismissed it.

¶ 5 Defendant appeals, arguing that the trial court recharacterized his petition as a successive petition for postconviction relief without first admonishing him under *People v. Pearson*, 216 Ill. 2d 58, 833 N.E.2d 827 (2005). We agree, and therefore, we vacate the dismissal of defendant's petition and remand for proper admonishments under *Pearson*. In addition, we conclude that we lack jurisdiction to address defendant's claim he is entitled to additional sentence credit, and we direct the trial court to vacate fines imposed by the circuit clerk.

¶ 6 I. BACKGROUND

¶ 7 A. Defendant's Murder Conviction

¶ 8 In July 2005, the State charged defendant with first degree murder (720 ILCS 5/9-1(a)(2) (West 2004)), alleging that he stabbed his victim with a knife. After a July 2006 trial, the jury found him guilty. The trial court later sentenced him to 40 years in prison. We affirmed defendant's conviction on direct appeal, rejecting his argument that the trial court abused its discretion by allowing the State to admit other-crimes evidence. *Young*, 381 Ill. App. 3d 595, 887 N.E.2d 649.

¶ 9 B. Defendant's April 2009 Postconviction Petition

¶ 10 In April 2009, defendant *pro se* filed a petition for postconviction relief under the Act. In it, defendant alleged that his trial counsel was ineffective for failing to raise various

issues. The trial court summarily dismissed the petition as frivolous and patently without merit. See 725 ILCS 5/122-2.1(a)(2) (West 2008) ("If the petitioner is sentenced to imprisonment and the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition ***."). On appeal, we affirmed the trial court's judgment. *Young*, No. 4-09-0486.

¶ 11 C. The October 2014 Petition at Issue in This Case

¶ 12 1. *Defendant's Petition*

¶ 13 In October 2014, defendant *pro se* filed a pleading titled "Petitioner's Motion/Request for a Fitness Hearing Pursuant to 735 ILCS 5/2-1401(f), Namely, a Relief of Judgment Petition." In it, defendant alleged that his trial counsel was ineffective for failing to inform the trial court of certain facts showing that defendant was unfit to stand trial. He also argued that trying him while unfit constituted a due process violation. As relief, defendant requested the court to order a psychological evaluation to retroactively determine whether he was fit at the time of his trial.

¶ 14 2. *The Trial Court's February 2015 Order*

¶ 15 In February 2015, the trial court entered a written order addressing defendant's petition, which was created from a template titled, "Docket Order on Petition for Post-Conviction Petition." It included various sections with check-boxes for the court to make findings pursuant to sections of the Act.

¶ 16 Under a section titled, "The court finds as follows, pursuant to 725 ILCS 5/122-1," the court found that defendant had filed a prior petition for postconviction relief. The court found further that defendant was not entitled to leave to file a successive postconviction petition because he had not shown cause and prejudice for failing to bring his claims in the original petition.

¶ 17 Under another section titled, "Pursuant to 725 ILCS 5/122-2.1," the court found that more than 90 days had passed since the filing and docketing of defendant's petition. Therefore, the court ordered the petition docketed for further consideration "in accordance with 725 ILCS 5/122-4 through 122-6." The court ordered a hearing on the petition for March 24, 2015. "Pursuant to 725 ILCS 5/122-6," the court found that defendant should not be brought to court for that hearing. The court did not appoint counsel to represent defendant. The court directed the State to answer the petition or move to dismiss within 30 days.

¶ 18 Later that month, the State filed a motion to dismiss defendant's filing. The State addressed the petition, alternatively, as a petition for relief from judgment under section 2-1401 of the Code and as a postconviction petition under the Act.

¶ 19 3. *The Trial Court's March 2015 Order*

¶ 20 On March 3, 2015, prior to the scheduled hearing date on defendant's petition, the trial court entered a one-paragraph written order dismissing defendant's "Motion for a Fitness Hearing" because "a fitness examination was conducted prior to trial and the defendant was found to be fit to stand trial."

¶ 21 4. *Defendant's Postjudgment Motions*

¶ 22 On March 23, 2015, defendant *pro se* filed two motions. One was titled, "Petitioner's Motion To Oppose the State's Motion To Dismiss," and the other, "Petitioner's Motion To Vacate Court's Premature Order Entered." In those motions, defendant argued that the trial court erred by recharacterizing his petition as a successive postconviction petition without notifying defendant. Defendant also argued that his petition should be considered a petition for relief from judgment under section 2-1401 of the Code and that defendant's legal claim that he was unfit excepted his section 2-1401 petition from the general two-year statute of

limitations (735 ILCS 5/2-1401(c) (West 2014)). Alternatively, defendant requested that the court vacate its March 2015 order and appoint counsel to represent defendant under the Act to determine whether to adopt defendant's *pro se* motions. Defendant attached an application for counsel, stating that he could not afford an attorney and wished to have one appointed.

¶ 23 5. *The Trial Court's June 2015 Order*

¶ 24 In June 2015, the trial court entered an order denying defendant's "Motion To Oppose the State's Motion To Dismiss." Although the court did not explicitly address defendant's "Motion To Vacate Court's Premature Order Entered," the court clarified that it stood by its order dismissing defendant's petition.

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 Defendant argues that the trial court erred by construing his *pro se* petition for relief from judgment as a postconviction petition without first admonishing defendant in accordance with *Pearson*. He requests that we vacate the trial court's judgment dismissing his petition and remand for the proper admonishments under *Pearson*. We agree with defendant's argument and therefore vacate the trial court's judgment.

¶ 28 Defendant also raises issues as to his sentencing credit and fines. In response, we vacate the imposition of certain fines.

¶ 29 A. The Act

¶ 30 The Act (725 ILCS 5/122-1 to 122-7 (West 2014)) provides a remedy for defendants whose convictions resulted from a substantial violation of their constitutional rights. *People v. Edwards*, 197 Ill. 2d 239, 243-44, 757 N.E.2d 442, 445 (2001). The Act sets up a three-stage process for adjudicating postconviction petitions. *People v. Boclair*, 202 Ill. 2d 89,

99, 789 N.E.2d 734, 740 (2002). A defendant may file only one postconviction petition without obtaining leave of court. 725 ILCS 5/122-1(f) (West 2014). To obtain leave of court, the defendant must satisfy the cause-and-prejudice standard by showing "cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure." *Id.*

¶ 31 A trial court may recharacterize an otherwise labeled *pro se* pleading and treat it as a postconviction petition. "[W]here a *pro se* pleading alleges a deprivation of constitutional rights cognizable in a postconviction proceeding, a trial court may treat the pleading as a postconviction petition, even where the pleading is labeled differently." *People v. Shellstrom*, 216 Ill. 2d 45, 53, 833 N.E.2d 863, 868 (2005). However, when a court recharacterizes a *pro se* pleading as a postconviction petition, the court must first do the following:

> "(1) notify the *pro se* litigant that the court intends to recharacterize the pleading, (2) warn the litigant that this recharacterization means that any subsequent postconviction petition will be subject to the restrictions on successive postconviction petitions, and (3) provide the litigant an opportunity to withdraw the pleading or to amend it so that it contains all the claims appropriate to a postconviction petition." *Id.* at 57, 833 N.E.2d at 870.

The foregoing admonishments help ensure that defendants raise all applicable claims in their recharacterized postconviction petition, lest they lose the opportunity to raise them later because of the cause-and-prejudice test.

¶ 32 In *Pearson*, 216 Ill. 2d at 68, 833 N.E.2d at 832, the supreme court held that the rationale of *Shellstrom* applies when a circuit court recharacterizes a petition as a *successive* postconviction petition. The court held that prior to recharacterizing as a successive

postconviction petition a *pro se* filing that is labeled otherwise, the circuit court must do the following:

> "(1) notify the *pro se* litigant that the court intends to recharacterize the pleading, (2) warn the litigant that this recharacterization means that the petition will be subject to the restrictions on successive postconviction petitions, and (3) provide the litigant an opportunity to withdraw the pleading or to amend it so that it contains all the factors and arguments appropriate to a successive postconviction petition that the litigant believes he or she has." *Id.* at 68, 833 N.E.2d at 832.

The *Pearson* court held that the admonishments were necessary to warn defendants that their successive postconviction petitions should include arguments establishing cause and prejudice for failing to bring their claims in their initial postconviction petitions. *Id.*

¶ 33 B. This Case

¶ 34 The State argues that the trial court did not recharacterize defendant's filing as a successive postconviction petition and, therefore, the *Pearson* admonishments were unnecessary. According to the State, the court treated the filing as a section 2-1401 petition, as it was labeled. We disagree.

¶ 35 The State does not contest that, if the trial court recharacterized his filing as a successive postconviction petition, it failed to properly admonish defendant pursuant to *Pearson*.

¶ 36 We conclude that the trial court recharacterized defendant's petition as a successive postconviction petition. The court's February 2015 order addressing the petition was titled, "Docket Order on Petition for Post-Conviction Petition [*sic*]." The court went on to make numerous findings that referenced various sections of the Act. For example, "Pursuant to 725 ILCS 5/122-2.1," the court found that more than 90 days had passed since the docketing of

defendant's petition. The court, therefore, ordered the cause docketed "for further consideration in accordance with sections 122-4 through 122-6." Further, the court found that defendant had not alleged that he was unable to pay the costs of the proceedings and was therefore not entitled to proceed as a poor person under section 122-2.1 of the Act (725 ILCS 5/122-2.1 (West 2014)).

¶ 37 In further support of the claim that the trial court recharacterized the petition, we note that defendant raised the kind of arguments cognizable in a postconviction petition. Specifically, defendant raised claims of a due process violation and ineffective assistance of counsel, both of which are constitutional claims cognizable in a postconviction petition under the right circumstances. The record overwhelmingly supports defendant's contention that the trial court recharacterized his pleading as a successive postconviction petition, despite the trial court's referring to the petition as a "Motion for Fitness Hearing" in its March 2015 order.

¶ 38 Because the trial court recharacterized defendant's petition as a successive postconviction petition, the court was required to admonish defendant in compliance with *Pearson*, 216 Ill. 2d at 68, 833 N.E.2d at 832. That is, the court was required to (1) notify defendant of the recharacterization, (2) warn defendant of the consequences of recharacterization, and (3) allow defendant to withdraw or amend his petition. *Id.* The court did not comply with *Pearson*. We therefore remand for proper compliance.

¶ 39 We note that although trial courts have the discretion to recharacterize a *pro se* petition as a postconviction petition, they are not required to do so. Section 122-1(d) of the Act addresses that point directly, as follows:

> "A person seeking relief by filing a petition under this Section must specify in the petition or its heading that it is filed under this Section. A trial court that has received a petition complaining of a conviction or sentence that fails to

> specify in the petition or its heading that it is filed under this Section need not evaluate the petition to determine whether it could otherwise have stated some grounds for relief under this Article." 725 ILCS 5/122-1(d) (West 2014).

Because of the prickly admonishment requirements of *Shellstrom* and *Pearson* that accompany recharacterization, this court has written that "recharacterization should occur only in unusual and compelling circumstances." *People v. Holliday*, 369 Ill. App. 3d 678, 682, 867 N.E.2d 1016, 1020 (2007).

¶ 40 C. New Issues: Sentence Credit and Fines Imposed by Circuit Clerk

¶ 41 1. *Sentencing Credit*

¶ 42 Defendant argues that the trial court denied him 183 additional days of presentencing custody credit for time he spent committed as unfit prior to his trial. 730 ILCS 5/5-8-7 (West 2004) (repealed by Pub. Act 95-1052, § 95 (eff. July 1, 2009)).

¶ 43 The State argues that under *People v. Nelson*, 2016 IL App (4th) 140168, 49 N.E.3d 1007, and *People v. Morrison*, 2016 IL App (4th) 140712, 64 N.E.3d 821, we lack jurisdiction and must dismiss defendant's claim.

¶ 44 We agree with the State and abide by our decisions in *Nelson* and *Morrison*, which hold that a request for presentence custody credit under section 5-8-7 of the Unified Code of Corrections (730 ILCS 5/5-8-7 (West 2004)) cannot be raised for the first time on appeal from postconviction proceedings. Instead, as noted in those cases, "defendant may petition the trial court to correct the simple error in arithmetic, as trial courts retain jurisdiction to correct nonsubstantial matters of inadvertence or mistake." *Morrison*, 2016 IL App (4th) 140712, ¶ 21, 64 N.E.3d 821; *Nelson*, 2016 IL App (4th) 140168 ¶¶ 36-38, 49 N.E.3d 1007.

¶ 45 2. *Fines Imposed by the Circuit Clerk*

¶ 46 Finally, defendant argues that we should vacate as void the following fines improperly imposed by the circuit clerk: (1) $50 court-finance assessment; (2) $10 arrestee's medical ("Medical Costs") assessment; and (3) $25 violent-crime-victims-assistance assessment. The State concedes that these three assessments are fines that are void and should be vacated because they were imposed by the circuit clerk. See *People v. Hible*, 2016 IL App (4th) 131096, ¶¶ 11-12, 53 N.E.3d 319 (fines imposed by circuit clerk are void). We therefore order the trial court to vacate the three fines listed above.

¶ 47 III. CONCLUSION

¶ 48 For the foregoing reasons, we vacate and remand with directions. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2016); see also *Hible*, 2016 IL App (4th) 131096, ¶ 28, 53 N.E.3d 319 ("The defendant must be successful in challenging every aspect of relief sought to prevent the State from assessing the statutory fee against him.").

¶ 49 Vacated and cause remanded with directions.

In the Circuit Court of the 7 TH Judicial Circuit
MORGAN County, Illinois
(~~Or in the Circuit Court of Cook County~~).

THE PEOPLE OF THE STATE OF ILLINOIS)
v.)
NELSON YOUNG)
Defendant/Appellant

No. 05-CF-136

FILED
JUL 13 2015
THERESA LONERGAN
Clerk of Circuit Court Morgan, Co. IL

Notice of Appeal

An appeal is taken from the order or judgment described below:

(1) Court to which appeal is taken:
TO THE 7TH JUDICIAL CIRCUIT TO TIMELY APPEAL TO THE FOURTH DISTRICT APPELLATE COURT

(2) Name of appellant and address to which notices shall be sent:
Name: NELSON YOUNG, I.D.# K-99533
Address: P.O.BOX 99, PONTIAC, IL. 61764

(3) Name and address of appellant's attorney on appeal:
Name: APPELLATE DEFENDER'S OFFICE OF THE 4TH DISTRICT
Address: 201 W. MONROE ST. P.O.BOX 19206, SPRINGFIELD IL. 62794-9206
If appellant is indigent and has no attorney, does he want one appointed? YES

(4) Date of judgment or order: 3-3-15 + ORDER DENYING THE STATES MOTION TO DISMISS BY PETITIONERS MOTION TO OPPOSE AND DENIES 6-23-15

(5) Offense of which convicted: MURDER

(6) Sentence:

(7) If appeal is not from a conviction, nature of order appealed from: ~~DENIAL~~ DENIAL OF A POST PETITION AND DENIAL OF PETITION TO OPPOSE AND DISMISS STATES MOTION TO DISMISS

Signed Nelson Young
(May be signed by appellant, ~~attorney for appellant, or clerk of circuit court~~)

Revised Feb 2002

C324

7TH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS
vs.) Case No. 05-CF-136
)
NELSON A. YOUNG)
Defendant

Date of Sentence 8/22/06
Date of Birth 2/3/58
Date of Birth N/A
(Victim)

JUDGMENT - SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHEREAS the above-named defendant has been adjudged guilty of the offenses enumerated below.

IT IS THEREFORE ORDERED that the defendant be and hereby is sentenced to confinement in the Illinois Department of Correct for the term of years and months specified for each offense.

	COUNT	OFFENSE	DATE OF OFFENSE	STATUTORY CITATION	CLASS	SENTENCE	MSI
Amended	1	First Degree Murder	7/19/05	720, 5/ 9-1(a)(2)	M	40 Yrs. 0 Mos.	3

and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:

____ ____ ____ ____ ____ ____Yrs.____Mos. ____

and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:

FILED
AUG 22 2006
THERESA LONERGAN
Clerk of Circuit Court Morgan Co. IL

____ ____ ____ ____ ____Yrs.____Mos. ____

The Court finds that the defendant is:

☐ Convicted of a class _____ offense but sentenced as a class X offender pursuant to 730 ILCS 5/5-5-3(c) (8)

The Court further finds that the defendant is entitled to receive credit for time actually served in custody (of 215 days as of the d this order) from (specify dates) _____

☐ The Court further finds that the conduct leading to conviction for the offenses enumerated in counts _____ resulted in bodily harm to the victim. (730 ILCS 5/3-6-3(a)(2)(iii)).

☐ The Court further finds that the defendant meets the eligibility requirements and is approved for placement in the impact incarcerati program. If the Department accepts the defendant and determines that the defendant has successfully completed the program, the sentence shall be reduced to time considered served upon certification to the Court by the Department that the defendant has successf completed the program. Written consent is attached.

☐ The Court further finds that offense was committed as a result of the use of, abuse of, or addiction to alcohol or a controlled substa

☐ IS FURTHER ORDERED that the sentence(s) imposed on count(s) _____ be (concurrent with) (consecutive to) sentence imposed in case number _____ in the Circuit Court of _____ County.

☒ IT IS FURTHER ORDERED that the defendant serve ☐ 85% ☒ 100% of said sentence.
IT IS FURTHER ORDERED that the Clerk of the Court deliver a certified copy of this order to the Sheriff.

IT IS FURTHER ORDERED that the Sheriff take the defendant into custody and deliver him to the Department of Corrections whic shall confine said defendant until expiration of his sentence or until he is otherwise released by operation of law.

☒ IT IS FURTHER ORDERED that defendant is ordered to pay court costs and $200.0 DNA fee. Defendant's attorney has expressed concern about safety of defendant.

This order is (XXX) effective immediately (_____ stayed until _____)

DATE August 22, 2006 ENTER Richard T. Mitchell

Illinois Conference of Chief Judges
3-18-05

Clerk

RICHARD T. MITCHELL, CIRCUIT JUDGE
(PLEASE PRINT JUDGE'S NAME HERE)