No. 129356

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. EARL E. RATLIFF, Defendant-Appellant.	) Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-21-0194)) There on Appeal from the Circuit Court of the Thirteenth Judicial Circuit, LaSalle County, Illinois, No. 19 CF 134)) The Honorable Cynthia M. Raccuglia, H. Chris Ryan, Jr., Judges Presiding.

BRIEF OF PLAINTIFF-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

NATURE OF THE ACTION

Defendant pleaded guilty to robbery, C107,[1] and the circuit court sentenced him to 15 years in prison, followed by a 3-year term of mandatory supervised release. C137. Defendant appeals from the appellate court's judgment holding that the circuit court substantially complied with Illinois Supreme Court Rule 401(a), and therefore that there was no plain error. No question is raised on the charging document.

ISSUES PRESENTED FOR REVIEW

Defendant, who had waived his right to counsel and elected to proceed pro se, entered a blind guilty plea. He then moved to withdraw that guilty plea, but after counsel was reappointed, counsel explained that defendant did not want to withdraw his guilty plea and sought only to challenge his sentence. On appeal, defendant argued for the first time that his waiver of his right to counsel was invalid because the circuit court did not comply with Rule 401(a), which requires that a circuit court advise a defendant of the nature of the charges, the applicable sentencing range, and his rights to counsel and — if indigent — appointed counsel. The issues presented are:

1. Whether the appeal should be dismissed under Illinois Supreme Court Rule 604(d) because defendant failed to satisfy a condition precedent to appealing his conviction by not moving to withdraw his guilty plea.

[1] "C," "CI," and "R" refer to the common law record, impounded common law record, and report of proceedings, respectively.

2. Whether defendant waived his Rule 401(a) challenge when he, through counsel, disavowed any interest in challenging his guilty plea, and only moved to reconsider his sentence.

3. If defendant merely forfeited his Rule 401(a) challenge, whether the circuit court did not clearly or obviously err in accepting defendant's waiver of his right to counsel (1) where the court admonished him two-and-a-half months before his waiver that he was charged with Class 2 felony robbery, that he faced Class X sentencing because of his criminal history, and that he had a right to counsel, and where the court granted his request for a public defender; and (2) where the record otherwise demonstrates that defendant's waiver was knowing, intelligent, and voluntary, and belies the notion that he would have proceeded with counsel or proceeded to trial had the court strictly complied with Rule 401(a).

4. Whether defendant cannot establish second-prong plain error where Rule 401(a) is a nonconstitutional prophylactic rule, and regardless, where a violation of that Rule is amenable to harmless error analysis.

JURISDICTION

On March 29, 2023, this Court allowed defendant's petition for leave to appeal. Accordingly, this Court has jurisdiction under Illinois Supreme Court Rules 315, 604(a), and 612(b).

STATEMENT OF FACTS

A. At the pre-trial stage, defendant invoked his right to appointed counsel but then waived his right to counsel and proceeded pro se.

A grand jury indicted defendant of one count of robbery for taking Samantha Leone's purse by force. C25. On April 24, 2019, defendant submitted an affidavit attesting to his indigency and requested that he "be represented by court-appointed counsel." C26. That same day, at his arraignment, the circuit court admonished defendant that he had "a right to an attorney" and granted his request for a public defender. R4.

The court further advised defendant that he was charged with Class 2 felony robbery but that based on his criminal history, he faced mandatory Class X sentencing. *Id.* Accordingly, the court informed defendant, "probation is not an option," and he faced a 6-to-30-year sentencing range, followed by a 3-year term of mandatory supervised release. R5. Defendant — through his counsel — waived "a reading of that indictment and [further] explanation of the possible penalties." *Id.* The court set a trial date for July 22 and scheduled a hearing on any pre-trial motions for July 11. C27.

Defendant waived his right to counsel during the July 11 hearing — the proceeding that immediately followed his arraignment. The prosecutor informed the court that "discovery has been tendered," and the "[p]arties are in [plea] negotiations." R10. Defendant attempted to speak on his own behalf, but the court instructed him to speak through his attorney. *Id.*

Defendant's counsel responded that "[h]e doesn't need an attorney" because "[h]e's going to be pro se." *Id.* Defendant confirmed this intent. *Id.*

Before accepting defendant's waiver, the court assessed defendant's capacity for self-representation. R11. First, the court asked defendant about his age, education, and "any mental disabilities or incapacities." *Id.* Defendant responded that he was 53 years old, that he had a ninth-grade education, and that he was "part . . . bipolar," but had no disabilities that could "incapacitate him." *Id.* The court also asked whether he had "prior involvement" with the legal system, and defendant responded that he did not. *Id.* This was incorrect; as the court later observed at sentencing, defendant has an "extensive criminal history," R217-18, including multiple violent felony convictions spanning nearly 40 years, *see* CI5-13 (detailing criminal history).

The court warned defendant of his responsibilities in, and the dangers of, proceeding pro se, and the benefits he was foregoing by waiving his right to counsel. *See* R11-12. Specifically, the court admonished defendant:

> Now, you have to understand something. Representing you on the particular matter in this is not simply a matter of stand up, tell your side of the story. There's procedures and protocol that have to be followed. [The prosecutor] is here to convict you. He's not here to help you. I'm not here to help you either. I just make sure you get a fair trial. I don't do research for you. He doesn't do research for you. We give you no special consideration in the jail or outside of the jail. You're going to [be] held responsible for any type of discovery cutoffs, rulings, filing of motions. They are going to be you[r] responsibility. You will receive, as long as you're incarcerated in the county jail, no special consideration in the jail as a result of representing

> yourself. You'll be provided access, of course, to the library that they have and internet, but it may be limited.
>
> Also, when you have an attorney representing you, they have freedom of access and movement and research availability to, you know, any type of matters that may need to be involved in. Also, you have the absolute right to represent yourself. I don't care one way or the other. If you discharge your lawyer, any claim about my lawyer didn't do something claim in the future is gone because you cannot claim ineffective [assistance] because you were representing yourself. So any mistakes or boo-boos that might happen in the future, they're all yours, no one else's. You can't blame anybody else. And you'll receive no extra time, although I'm going to give you some time now. You are set for next Friday. They're going to give you all of the discovery that they have so that you can go through your discovery between now and next Friday, and then you can come up and tell me where you stand as far as being prepared for trial.

R11-12. Defendant acknowledged that he understood the court's warnings. R13.

When asked whether anyone had forced him to go pro se, defendant said he was "forced" to do so because his attorney "came and threatening me with 22 years." *Id.* But counsel responded that it was his "duty, once [he receives] an offer, to convey it to [defendant]," suggesting that the People had conveyed a plea offer that included a 22-year prison term. *Id.* Defendant separately claimed that counsel was unwilling to hear defendant's account of the robbery, and counsel responded that he had "discussed his defense with [defendant]" but declined to elaborate on grounds of attorney-client privilege. R14. Ultimately, the court found that defendant was "not being forced" to go pro se and accepted defendant's waiver. *Id.*

The court initially let the scheduled trial date — a mere 10 days away — stand, C48, but later continued the case several times, in part, because defendant filed a litany of pre-trial motions. For example, one week after defendant waived his right to counsel, he challenged his prosecution on Eighth Amendment grounds. C50-51. In the motion, he acknowledged that he was charged with "Robbery (Class 2 Felony)." C51. And though defendant conceded that he "took" Leone's cell phone, he denied stealing her purse or causing her any bodily harm. C50. Two weeks later, defendant filed a "Motion to Suppress" that likewise acknowledged that he was "charged with the offense of strong robbery (Class 2)." C53. The court denied these motions and the motions that followed. C67, 96.

Several months later, on the day trial was then set to begin, defendant announced that he wanted to enter a blind guilty plea. R190. Before accepting the plea, the court again admonished defendant of the nature of the charge and of the 6-to-30-year sentencing range, as well as the other consequences of his plea. R190-93.

The court accepted defendant's guilty plea. R197. As a factual basis, defendant agreed that he followed Leone to her car at a gas station and asked her for a ride home as a ruse. R194. He then announced a robbery, assaulted her, and took her purse. R194-95. He sold Leone's cell phone the next day. R195.

At sentencing, the People surveyed defendant's criminal history dating back to 1984, which includes convictions and periods of incarceration for robbery, aggravated battery, attempted murder, domestic battery, and felony theft. R217-19. Based on that extensive history, the People argued that defendant is a "dangerous person and a threat to society" and asked for a 25-year sentence. R220-21. The court agreed that "a substantial amount of incarceration above six years . . . is warranted" but imposed a 15-year prison term. R226-27. Although noting that the People's concerns were well taken, the court found that defendant's guilty plea "show[ed] conscious[ness] of guilt and remorse," R225, and found that defendant's substance abuse and "mental health issues" were mitigating factors, R226.

B. Defendant initially moved to withdraw his guilty plea, but then informed the court through appointed counsel that he no longer wished to withdraw that plea.

Defendant filed a pro se motion styled "Appeals Motion to Withdraw Plead [sic] of Guilty" that asked the circuit court to reconsider his sentence or to vacate his guilty plea — raising arguments that defendant later abandoned on appeal. C144-47.

At a hearing, defendant explained that he wanted a "private attorney" because he wanted "to have a speedy trial." R244. The court granted defendant leave to hire an attorney for his post-plea motions and again advised him that it would appoint counsel if he could not afford an attorney. *Id.*

The court subsequently reappointed defendant's prior counsel. C204. At a status hearing, counsel said that defendant "informed [him] that [defendant] d[id] not wish" to move to vacate his guilty plea. R284. Instead, defendant only wanted counsel to draft a motion to reconsider defendant's sentence. *Id.* Counsel subsequently filed an amended motion to reconsider the sentence, C218, along with a certificate under Rule 604(d) attesting that he examined "the trial court file and report of proceedings of the plea of guilty and the report of proceedings in the sentencing hearing" and "made any amendments to the motion necessary for the adequate presentation of any defects in those proceedings," C220. The court denied the amended motion to reconsider the sentence. C221.

C. On appeal, defendant asserted for the first time that his waiver of his right to counsel was invalid under Rule 401(a).

On appeal, defendant argued — for the first time — that his conviction should be vacated because the circuit court did not provide the Rule 401(a) admonishments.[2] The Rule provides that a court

> shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:
>
> (1) the nature of the charge;
>
> (2) the minimum and maximum sentence prescribed by law, including, when applicable, the

[2] Defendant also argued that his counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to file a post-plea motion that challenged the circuit court's admonishments under Rule 401(a). He has abandoned that claim in this Court.

> penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and
> (3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court.

Ill. S. Ct. R. 401(a). Over a dissent, the appellate court affirmed the circuit court's judgment. *See People v. Ratliff*, 2022 IL App (3d) 210194-U, ¶ 18.

The appellate court held that defendant had forfeited his Rule 401(a) challenge by not raising it in a post-plea motion. *Id.* ¶ 11. And though it stated its belief that a Rule 401(a) error would constitute second-prong plain error, *id.*, the court concluded that defendant could not show a clear or obvious error because the circuit court substantially complied with Rule 401(a), *see id.* ¶¶ 13-15.

This Court has explained that "substantial compliance" — rather than "[s]trict, technical compliance" — with Rule 401(a) is sufficient "if the record indicates that the waiver was made knowingly and voluntarily, and the admonishment the defendant received did not prejudice his rights." *People v. Haynes*, 174 Ill. 2d 204, 236 (1996). Applying that standard, the appellate court concluded that defendant's waiver was valid. *Ratliff*, 2022 IL App (3d) 210194-U, ¶ 14. The court highlighted the circuit court's inquiries about defendant's education and involvement in the legal system, as well as the circuit court's "extensive[]" warnings about the "disadvantages of self-representation." *Id.* Moreover, the appellate court noted, defendant learned of his sentencing exposure at his arraignment — less than three months

before his waiver. *Id.* Finally, the court observed, defendant's pre-trial motions demonstrated his knowledge of the nature of the charges, and that he was "aware of and willing to assert his right to counsel." *Id.*

STANDARDS OF REVIEW

The "proper application" of a Supreme Court rule is a question of law that this Court ordinarily reviews de novo. *People v. Johnson*, 2019 IL 122956, ¶ 22. This Court also reviews de novo whether defendant complied with Rule 604(d), *People v. Sophanavong*, 2020 IL 124337, ¶ 21, and whether defendant preserved his Rule 401(a) challenge for appellate review, *People v. Brown*, 2020 IL 125203, ¶ 25.

ARGUMENT

Defendant exercised his right to self-representation and later pleaded guilty. And through his appointed counsel, defendant disavowed any interest in withdrawing that plea. This Court should reject defendant's belated challenge — argued for the first time on appeal — that his waiver of counsel was invalid due to alleged non-compliance with Rule 401(a).

A defendant's constitutional right to counsel includes a corresponding right to proceed *without* counsel. *People v. Wright*, 2017 IL 119561, ¶ 39 (citing *Faretta v. California*, 422 U.S. 806, 832-34 (1975)). A defendant may exercise his right of self-representation so long as his waiver of his right to counsel "is voluntary, knowing, and intelligent." *Id.* The court must honor a valid waiver even if it is "unwise," as a "defendant's knowing and intelligent

election to represent himself must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Haynes*, 174 Ill. 2d at 235 (quoting, *e.g.*, *Illinois v. Allen,* 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)). The right to self-representation is so fundamental that a denial of that right is structural error. *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (right to self-representation "is either respected or denied; its deprivation cannot be harmless").

Because defendant did not move to withdraw his guilty plea, the appellate court lacked authority to consider his challenge to his conviction. And even if the court had such authority, defendant waived his Rule 401(a) challenge, which bars appellate review. At best, defendant has forfeited the issue, and he cannot establish a plain error. He cannot establish a clear or obvious error because the circuit court substantially complied with Rule 401(a), his waiver was otherwise valid, and he was not prejudiced by any defect in the court's admonishments. And regardless, he cannot show second-prong plain error — the only prong he invokes here. The second prong "requires a showing of structural error," *People v. Jackson*, 2022 IL 127256, ¶ 26, meaning a constitutional error that "def[ies] analysis by 'harmless-error' standards," *id.* ¶ 49 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)). Defendant cannot satisfy that rubric. A Rule 401(a) error is not a constitutional error, but rather an error involving a prophylactic means of

protecting a defendant's right to counsel. And in any event, a violation of Rule 401(a) is amenable to harmless error analysis.

I. Defendant Failed to Satisfy a Condition Precedent to Perfect His Appeal Under Rule 604(d), and Regardless, Defendant Waived — or at Best, Forfeited — His Rule 401(a) Challenge.

A. Defendant failed to comply with Rule 604(d), which requires that a defendant move to withdraw his guilty plea in order to appeal his conviction.

Although the appellate court's merits conclusion is correct, *see infra* Part II.A, this Court should vacate the court's judgment and dismiss this appeal because defendant did not comply with Rule 604(d), which is a condition precedent to filing any post-plea appeal. In relevant part, Rule 604(d) conditions a defendant's right to appeal a judgment entered upon a plea of guilty on the timely filing of "a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment." Ill. S. Ct. R. 604(d). A timely motion to withdraw a guilty plea is a "condition precedent to an appeal from a guilty plea." *People v. Breedlove*, 213 Ill. 2d 509, 516-17 (2004) (citing *People v. Wilk*, 124 Ill. 2d 93, 105 (1988)). Defendant's failure to satisfy that condition precedent "precludes the appellate court from considering the appeal on the merits," and the appellate court "*must* dismiss the appeal," unless defendant can satisfy exceptions that he does not invoke here. *People v. Flowers*, 208 Ill. 2d 291, 301 (2003) (emphasis added).

"Rule 604(d) was designed to meet a specific need" — specifically, to respond to a flood of guilty-plea appeals where "many of the errors complained of could and undoubtedly would be easily and readily corrected, if called to the attention of the trial court." *Wilk*, 124 Ill. 2d at 106. To that end, Rule 604(d) "eliminate[s] needless trips to the appellate court" and gives "the circuit court an opportunity to consider the alleged errors and to make a record for the appellate court to consider on review in cases where a defendant's claim is disallowed." *People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 40 (2011).

Here, defendant failed to satisfy Rule 604(d)'s condition precedent to appealing his conviction, so the appellate court could not pass on the merits of his claims. *Flowers*, 208 Ill. 2d at 301. Although defendant initially filed a pro se motion to withdraw his guilty plea, C144, appointed counsel later told the court that defendant "informed" him that he "d[id] not wish" to move to vacate his guilty plea. R284. Accordingly, counsel's amended motion sought only to reconsider the sentence. C218.

Defendant's disavowal of any interest in withdrawing his guilty plea and subsequent motion challenging his sentence alone is tantamount to not filing a motion to withdraw his guilty plea. *Cf. Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.,* 96 Ill. 2d 150, 154 (1983) (where amended complaint "is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most

purposes, being in effect abandoned and withdrawn"). By withdrawing his motion and not renewing his challenge to his guilty plea, defendant frustrated the purpose of Rule 604(d), which requires that a defendant alert the circuit court to any errors so that the court can pass on them in the first instance. *Skryd*, 241 Ill. 2d at 40. The only operative post-plea motion that the court considered here was counsel's motion to reconsider the sentence, which did not assert any error under Rule 401(a). *See* C218, C221. In other words, defendant deprived the circuit court of any opportunity to correct the error that he now claims compels reversal. Accordingly, this Court should vacate the appellate court's judgment and dismiss this appeal. *See Skryd*, 241 Ill. 2d at 40 ("Where a defendant has failed to file a motion to withdraw the guilty plea, the appellate court must dismiss the appeal."); *Flowers*, 208 Ill. 2d at 309 (vacating the circuit and appellate court's judgments on the merits and remanding with directions to dismiss).

To be sure, the People did not seek dismissal in the appellate court based on defendant's failure to satisfy Rule 604(d)'s condition-precedent requirement. But the appellate court should have sua sponte dismissed the appeal. Although the failure to file a proper Rule 604(d) motion "does not deprive the appellate court of jurisdiction," *Flowers*, 208 Ill. 2d at 301, defendant's failure nevertheless deprived the appellate court of authority to pass on the challenge to his conviction, *see id.*; *see also Wilk*, 124 Ill. 2d at 106 (if appellate court addresses merits despite defendant's failure to comply with

Rule 604(d), "the rule has been ignored"). Indeed, defendant acknowledged his failure before the appellate court and argued — incorrectly — that review was not barred because his motion to reconsider sentence satisfied the "condition-precedent requirement for initiating an appeal" over his *conviction*. Br. Arg. Def.-Appellant 16 & n.1, *People v. Ratliff*, 2022 IL App (3d) 210194-U.

In sum, the appellate court had no authority to review defendant's conviction, and this Court should vacate its judgment and dismiss the appeal.

B. Defendant's Rule 401(a) challenge is waived, or at a minimum, forfeited.

For similar reasons, defendant's Rule 401(a) challenge is waived, or at best, forfeited. By withdrawing his motion to withdraw guilty plea and informing the circuit court that he wanted his guilty plea to stand, defendant waived his Rule 401(a) challenge. Thus, this Court should not address his challenge. In the alternative, defendant forfeited his Rule 401(a) challenge by not raising it in the circuit court, and this Court should review only for plain error.

Rule 604(d)'s "waiver rule" provides that issues not raised in a motion to reconsider the sentence or motion to withdraw guilty plea "shall be deemed waived" on appeal. The "waiver rule" serves similar interests as Rule 604(d)'s condition-precedent requirement, in that it also ensures that the circuit court can address any errors in the entry of the guilty plea. *See Sophanavong*, 2020 IL 124337, ¶ 22. And it prevents "open-ended appeals"

by channeling to the appellate court only those "errors considered significant" in trial proceedings, as "'[a]ppellate counsel may comb the record for every semblance of error and raise issues on appeal whether or not trial counsel considered them of any importance.'" *Id.* ¶ 25 (quoting *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)). Accordingly, just as defendant's failure to file a motion to withdraw his guilty plea precludes him from challenging that plea on appeal, any possible issue related to the plea itself — including the one defendant presses in this appeal — is at least forfeited. *See id.* ¶ 22 n.1.

Here, though, defendant waived his Rule 401(a) challenge, which forecloses appellate review entirely. *See People v. Stewart*, 2018 IL App (3d) 160205, ¶ 20 (waiver forecloses even plain-error review). A "[w]aiver is an intentional relinquishment or abandonment of a known right or privilege, while forfeiture is the failure to make the timely assertion of a right." *People v. Brown*, 2020 IL 125203, ¶ 25. Put differently, a defendant's silence in the face of an error — i.e., a failure to object — constitutes forfeiture, whereas his "affirmative[] acquiesce[nce]" to that error is a waiver. *People v. Dunlap*, 2013 IL App (4th) 110892, ¶ 11; *see also People v. Parker*, 223 Ill. 2d 494, 508 (2006) (finding waiver where defendant's counsel stated "[n]o objection" to jury instruction).

Defendant disavowed any interest in withdrawing his guilty plea, resulting in waiver, rather than forfeiture. Far from standing silent, defendant affirmatively stated that he no longer wished to withdraw his

guilty plea — i.e., that he wanted his guilty plea to stand. R284. In short, this Court should not permit defendant to unwind his guilty plea and proceed to trial, *see* Def. Br. 14, when in the circuit court he affirmatively disclaimed any interest in the relief he now seeks. As a result of defendant's waiver, his claim is not subject to appellate review, even for plain error. *See People v. Jones*, 2023 IL 127810, ¶¶ 40-41 (affirmative acquiescence forecloses even plain-error review).

In the appellate court, the People argued that defendant had invited error by disclaiming interest in withdrawing his guilty plea. Br. Arg. Pl.-Appellant 17, *People v. Ratliff*, 2022 IL App (3d) 210194-U. It is true that the distinctions between waiver and invited error have been blurred. *See, e.g.*, *People v. Hughes*, 2015 IL 117242, ¶ 37 (waiver and forfeiture "terms have been used interchangeably at times, particularly in the criminal context, despite representing distinct doctrines"). But regardless whether defendant's disavowal of interest in withdrawing his guilty plea is a waiver or an invited error, the result is the same: appellate review is barred. *See People v. Smith*, 2019 IL App (1st) 161246, ¶ 51 ("[w]hether we couch [defendant's actions] in terms of 'waiver' or 'invited error,' plain-error review . . . is not available").

In the alternative, defendant's Rule 401(a) challenge is at least forfeited, and this Court can review it only for plain error. In addition to Rule 604(d)'s preservation rules, defendant was required to contemporaneously object to the circuit court's alleged error and then "raise

the alleged error in a written posttrial motion." *See People v. Reese*, 2017 IL 120011, ¶ 60 (reviewing Rule 401(a) error for plain error). He did neither.

Indeed, defendant does not dispute that he failed to preserve the issue and "requests that this Court review this issue for plain error." Def. Br. 20. Yet he also claims — in contradictory fashion — that his failure to preserve the claim should "not be held against him on appeal" because of the nature of a Rule 401(a) challenge. *Id.* But this Court has already held that Rule 401(a) challenges are not exempt from preservation rules, as it has applied the forfeiture doctrine to Rule 401(a) errors, even for pro se litigants. *See Reese*, 2017 IL 120011, ¶ 60; *People v. Johnson*, 119 Ill. 2d 119, 131 (1987).

There is no inherent unfairness in applying the forfeiture doctrine here, particularly because defendant *was* represented by counsel (1) during the July 11, 2019, hearing when the circuit court engaged in a colloquy before accepting defendant's waiver, R10; and (2) after sentencing, when appointed counsel could have moved to withdraw defendant's guilty plea, but declined to do so at defendant's request, R284. Tellingly, defendant argued in the appellate court — in his now-abandoned *Strickland* claim — that his counsel "was present in court" when the alleged Rule 401(a) error occurred and "should have either notified the court of its noncompliance with Rule 401(a)" then or "amended [defendant's] motion to vacate guilty plea to include this error." Br. Arg. Def.-Appellant 21, *People v. Ratliff*, 2022 IL App (3d) 210194-

U. In other words, defendant conceded that he had the opportunity to preserve his Rule 401(a) challenge through counsel but failed to do so.

In sum, this Court should find that defendant waived, or at least forfeited, his Rule 401(a) challenge. Preservation rules "disallow[] the defendant to obtain a reversal through inaction." *People v. Herron*, 215 Ill. 2d 167, 175 (2005). That principle holds with even greater force here, where defendant affirmatively told the circuit court that he wanted his guilty plea to stand.

II. The Circuit Court Did Not Plainly Err.

Even if defendant merely forfeited his Rule 401(a) challenge, it cannot succeed because defendant cannot demonstrate plain error. The plain-error doctrine is a "narrow exception to forfeiture principles" that "does not call for the review of all forfeited errors." *People v. Jackson*, 2022 IL 127256, ¶¶ 18, 19; *see also People v. Allen*, 222 Ill. 2d 340, 353 (2006) ("The plain-error doctrine is not a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court." (cleaned up)). Instead, the doctrine permits review of a forfeited claim only if a defendant can clear two hurdles. First, the defendant must show that the circuit court committed a "clear or obvious error." *Jackson*, 2022 IL 127256, ¶ 21. And second, the defendant must situate that "clear or obvious error" under "one of two alternate prongs," namely,

> (1) where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from a clear or obvious error and not the evidence or (2) when a clear or obvious error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process.

Id. ¶ 19

Defendant does not even attempt to demonstrate first-prong plain error, Def. Br. 21-22, and this Court should limit its review accordingly, *see Jackson*, 2022 IL 127256, ¶ 25 (reviewing only for second-prong plain error where defendant does not invoke first-prong plain error). Moreover, defendant cannot establish that the circuit court committed any error, let alone the sort of grave error that the second-prong plain-error doctrine is designed to cure.

A. Defendant cannot show that the circuit court clearly or obviously erred in accepting his waiver of his right to counsel.

Here, the circuit court substantially complied with Rule 401(a) given its admonishments at defendant's arraignment — the hearing that immediately preceded defendant's waiver. And the record makes overwhelmingly clear that defendant's waiver was otherwise knowing, intelligent, and voluntary, and that any defect in the court's admonishments did not prejudice his rights. Accordingly, the court did not commit any error in accepting defendant's waiver of his right to counsel, much less a clear or obvious error. "A plain error is, to begin with, plain," meaning "more than an

arguable error." *People v. Stevenson*, 2020 IL App (4th) 180143, ¶ 14. The appellate court correctly held that defendant cannot clear that high bar.

Rule 401(a) provides that a court "shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment" unless it "first, by addressing the defendant personally in open court, inform[s] him of and determine[s] that he understands the following":

> (1) the nature of the charge;
> (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and
> (3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court.

Ill. S. Ct. R. 401(a). This Court has long recognized, however, that "[s]trict, technical compliance" with Rule 401(a) is "not always required." *Reese*, 2017 IL 120011, ¶ 62. "Substantial compliance is sufficient for a valid waiver of counsel if the record indicates the waiver was made knowingly and intelligently and the trial court's admonishment did not prejudice the defendant's rights." *Id.* Whether the waiver was otherwise valid and whether defendant was not prejudiced depend on a "review of the entire record." *Johnson*, 119 Ill. 2d at 132. And this Court has stressed that the substantial-compliance standard must not be applied mechanically, as "each waiver of counsel must be assessed on its own particular facts." *Reese*, 2017 IL 120011, ¶ 62.

Here, the circuit court did not clearly and obviously err, as defendant's waiver satisfies the two-part inquiry that governs a Rule 401(a) claim in the absence of strict compliance. First, the court substantially complied with the Rule. Second, the court's substantial compliance is sufficient for a valid waiver because the record shows (1) that defendant otherwise knowingly, intelligently, and voluntary waived his right to counsel, and (2) that defendant was not prejudiced by any defect in the admonishments.

1. The circuit court substantially complied with Rule 401(a).

The circuit court substantially complied with Rule 401(a). At the very least, it is not clear or obvious that the court fell short of doing so.

In applying the substantial-compliance standard under Rule 401(a), this Court has considered both the nature of the defect and whether the Rule's purpose was well served. *See*, *e.g.*, *Haynes*, 174 Ill. 2d at 241-42. In that light, the circuit court substantially complied with Rule 401(a) because its error — giving the admonishments prematurely — did not undermine Rule 401(a)'s fundamental goal of ensuring a knowing and intelligent waiver. *See*, *e.g.*, *id.* ("[t]he purpose of Rule 401(a) . . . was not frustrated" where circuit court otherwise had a basis to conclude that "defendant knew and understood his rights and had made a knowing and intelligent decision to waive counsel"); *People v. Coleman*, 129 Ill. 2d 321, 333-34 (1989) ("where a defendant knows the nature of the charges against him and understands that as a result of those charges he may receive the death penalty, his knowledge

and understanding that he may be eligible to receive a lesser sentence [natural life] pales in comparison"). Under similar circumstances, this Court has found substantial compliance where the admonishments were incomplete, *Haynes*, 174 Ill. 2d at 242 (circuit court failed to advise defendant of minimum and maximum sentences for one charge), or even partially inaccurate, *see Wright*, 2017 IL 119561, ¶ 54 (court informed defendant that he faced a 60-year, not a 75-year, maximum sentence); *People v. Coleman*, 129 Ill. 2d 321, 339 (1989) (defendant advised that minimum sentence was 20 years, when in fact it was natural life). In contrast, this Court held that a court did not substantially comply with Rule 401(a) where it made no "attempt to inform [defendant] of the nature of the charges, the range of possible penalties, or his right to counsel." *People v. Campbell*, 224 Ill. 2d 80, 84-85 (2006), *as modified on denial of reh'g* (Jan. 22, 2007).

Defendant does not dispute that he was accurately and completely advised of the "nature of the charge," "the minimum and maximum sentences prescribed by law," and both his "right to counsel" and right to appointed counsel given his indigency. Indeed, the circuit court advised defendant at his arraignment (1) that he was charged with one count of "robbery, a Class 2 felony," R4-5; (2) that he faced "Class X sentencing" given his criminal record — i.e., a 6-to-30-year prison term, followed by a 3-year MSR term, R5; and (3) that he had a "right to an attorney" and that he was "eligible" for appointed counsel based on his affidavit attesting to his indigency, R4.

Defendant's argument that his waiver was invalid merely because the court gave the admonishments two-and-a-half months early, Def. Br. 14-17, is inconsistent with this Court's precedent. As defendant tells it, such premature admonishments fall short of even substantial compliance because "Rule 401(a) admonishments must be provided 'at the time the court learns that a defendant chooses to waive counsel, so that the defendant can consider the ramifications of such a decision.'" *Id.* at 15 (quoting *People v. Jiles*, 364 Ill. App. 3d 320, 329 (2d Dist. 2006)) (emphasis omitted). But in *Haynes*, this Court held that contemporaneous admonishments are "preferrable" but rejected any rule that "the failure of a trial judge to admonish a defendant contemporaneously with his waiver is *always* fatal to the validity of a waiver of counsel." 174 Ill. 2d at 242 (emphasis added).

Indeed, this Court found substantial compliance in *Haynes* where the defects included a nearly identical interval between the admonishments and the defendant's waiver. *Id.* at 241. *Haynes* reasoned that although the admonishments "were given a number of weeks prior to the defendant's waiver," they were nevertheless "given at a time when the defendant had indicated a desire to waive counsel." *Id.* For that reason, the Court explained, Rule 401(a)'s ends were "not frustrated," as the circuit court "had a sufficient basis for concluding that the defendant knew and understood his rights and had made a knowing and intelligent decision to waive counsel."

Id. at 241-42. This was so even though the circuit court had also omitted the minimum and maximum sentences permitted for one charge. *Id.* at 241.

To be sure, "[i]n some cases, circumstances may dictate that a lapse in time" between the admonishments and the waiver renders "the waiver invalid." *Id.* at 242. In *Haynes*, this Court identified *People v. Langley,* 226 Ill. App. 3d 742 (4th Dist. 1992), as one such instance, where the "waiver [was] held invalid because [the] only admonishments had been given at the defendant's arraignment seven months earlier, at a time when the defendant was not requesting to waive counsel." *Id.* But this non-controlling obiter dictum, *People v. Reed*, 2020 IL 124940, ¶ 23 (declining to defer to "scant analysis and resulting obiter dicta" on point that was not argued or essential to holding), did not purport to announce a per se rule that a defendant *must* be contemplating a waiver of counsel when admonished. Indeed, immediately before that dictum, *Haynes* reasserted that "each case must be assessed on its own particular facts." 174 Ill. 2d at 242.

In any event, *Langley* is distinguishable on multiple points. For one thing, Langley first sought to proceed pro se at sentencing. 226 Ill. App. 3d at 748. Thus, not only was the seven-month interval between arraignment and the waiver four months longer than in the present case, *id.* at 749, but there were significant intervening court proceedings — including a jury trial — between Langley's arraignment and his waiver, *id.* at 743-45. Accordingly, the appellate court found that the effect of the admonishments at

arraignment dissipated with the passage of time and the progression of the case. *See id.* at 749.

Here, in contrast, defendant's waiver came at the court appearance immediately following the admonishments at his arraignment. Given the proximity between defendant's arraignment and his waiver, this short interval — as in *Haynes* — "did not negate the effectiveness of the admonishments." 174 Ill. 2d at 242. In sum, there was a "sufficient basis for concluding that the defendant knew and understood his rights" and that Rule 401(a)'s driving purpose was "not frustrated." *Id.* at 241-42. Indeed, there is a stronger basis to conclude here that Rule 401(a)'s purpose was well served relative to *Haynes*, where the admonishments were both premature and incomplete. *Id.* at 211.

2. The circuit court's substantial compliance with Rule 401(a) was sufficient for a valid waiver because defendant knowingly, intelligently, and voluntarily waived his right to counsel, and the premature admonishments did not prejudice him.

Furthermore, the circuit court's substantial compliance with Rule 401(a) was sufficient for an effective waiver because the record (1) makes clear that defendant knowingly, intelligently, and voluntarily waived his right to counsel; and (2) belies his claim of prejudice. *See Reese*, 2017 IL 120011, ¶ 62. And at the very least, defendant cannot clearly or obviously establish the contrary.

a. Knowing, Intelligent, and Voluntary Waiver

Defendant offers this Court no basis to conclude that his waiver was not knowing and intelligent. Nor can he. Even setting aside the court's admonishments at defendant's arraignment, the record makes clear that defendant knew everything required by Rule 401(a) at the time he waived his right to counsel.

For starters, defendant displayed his awareness of the "nature of the charge" in his pre-trial motions in the days and weeks following his waiver. *See* C50-51, 53-55. One week after his waiver, for instance, defendant acknowledged that he was charged with "Robbery (Class 2 Felony)," and he admitted that he "took" Leone's cell phone, but denied stealing her purse or causing her any bodily harm. C50-51. If nothing else, the simplicity of the charges militates in favor of a finding that defendant understood the charges against him. *See People v. Phillips*, 392 Ill. App. 3d 243, 263 (1st Dist. 2009) (finding "nothing in the record to indicate that defendant failed to understand the charges against him" where the aggravated battery "charges were fairly simple: he was accused of hitting a deputy sheriff in the face").

Defendant also demonstrated that he knew that he had the right to counsel — and in fact, the right to appointed counsel — by initially invoking those rights prior to his decision to waive them. *See* C26. The fact that defendant was represented by counsel for nearly three months before his waiver further demonstrates defendant's awareness of his rights. *Phillips*,

392 Ill. App. 3d at 264 (because defendant had, until his waiver, "been represented by appointed counsel, he knew that he had a right both to counsel in general and to appointed counsel due to being indigent"); *see also People v. Jackson*, 59 Ill. App. 3d 1004, 1008 (1st Dist. 1978) ("defendant understood this right to counsel because he had in fact been represented by the public defender of Cook County, without charge, until he discharged him").

Finally, defendant generally knew of his potential sentencing exposure. At the hearing when defendant waived his right to counsel, he told the court that his counsel "threaten[ed] [him] with 22 years" — i.e., counsel had conveyed a plea offer that carried a 22-year prison term. R13. Defendant thus knew, or should have known, that he faced a sentence within the Class X sentencing range, 730 ILCS 5/5-4.5-25(a), and that he risked a sentence of *more* than 22 years if he opted to proceed to trial.

Nor was this defendant's first encounter with the criminal justice system. *See Johnson*,119 Ill. 2d at 133 (finding an effective waiver in part because defendant was "no stranger to criminal proceedings"); *People v. Redmond*, 2018 IL App (1st) 151188, ¶ 26 ("A defendant's extensive experience with the court system is one indication that he knows what proceeding without counsel means and that the waiver is knowing and voluntary[.]") (citing *People v. Redd*, 173 Ill. 2d 1, 22 (1996)). On the contrary, defendant has an extensive criminal history dating back almost 40

years. *See* CI5-13 (detailing criminal history). In the five years preceding his conviction in this case, defendant had four other felony convictions. *See* CI9-12. And the dockets for nine of his felony cases show that defendant was represented by a public defender.[3] As in *Johnson*, defendant's long criminal history and experience with appointed counsel gave defendant "ample opportunity to become acquainted with his right to counsel," 119 Ill. 2d at 133, and left him well equipped to understand the charges, punishment, and rights at issue in his proceedings.

Moreover, the circuit court warned defendant of the "hazards ahead" immediately before accepting his waiver. *See Iowa v. Tovar*, 541 U.S. 77, 89 (2004). Even the dissent below recognized that the court did its level best to explain the disadvantages that come with going pro se. *See Ratliff*, 2022 IL App (3d) 210194-U, ¶ 21 (McDade, J., dissenting) ("The trial court made admirable efforts to dissuade defendant from the unwise decision to represent himself."). Among other things, the court advised defendant (1) that he needed to follow court "procedures and protocol," and that self-representation was "not simply a matter of stand[ing] up" and "telling your

[3] *People v. Ratliff*, No. 17-CF-210 (Cir. Ct. Stephenson Cnty.); *People v. Ratliff*, No. 17-CF-51 (Cir. Ct. Stephenson Cnty.); *People v. Ratliff*, No. 14-CF-86 (Cir. Ct. Stephenson Cnty.); *People v. Ratliff*, No. 13-CF-153 (Cir. Ct. Stephenson Cnty.); *People v. Ratliff*, No 06-CR-117070 (Cir. Ct. Cook Cnty.); *People v. Ratliff*, No. 02-CR-294480 (Cir. Ct. Cook Cnty.); *People v. Ratliff*, No. 98-CF-257 (Cir. Ct. Rock Island Cnty.); *People v. Ratliff*, No. 93-CF-793 (Cir. Ct. Rock Island Cnty.); *People v. Ratliff*, No. 84-13665 (Cir. Ct. Cook Cnty).

side of the story," R11; and (2) that he would be responsible for research and "discovery cutoffs, rulings, [and] filling of motions," and he would get "no special consideration" and would generally get "no extra time" merely because he was proceeding pro se, R12. Defendant acknowledged that he understood the court's warnings, R13, and cannot credibly dispute that he knew "what he [wa]s doing'" and made "his choice . . . with eyes open," *Tovar*, 541 U.S. at 88 (internal quotations omitted).

Defendant's response that he was "ill-equipped to proceed pro se" — as evidenced by his meritless pre-trial motions and failure to properly conduct discovery, Def. Br. 17-19 — is beside the point. No one disputes that defendant — just as any other pro se litigant untrained in the law — was not as well-versed in the law as counsel. But even an "unwise" but valid waiver "must be honored." *Haynes*, 174 Ill. 2d at 235. And a defendant's ability to adequately advance his cause largely has no bearing on whether his waiver was valid. *See Faretta*, 422 U.S. at 836 (a defendant's "technical legal knowledge . . . [i]s not relevant to an assessment of his knowing exercise of the right to defend himself"); *Redd*, 173 Ill. 2d at 24 (rejecting claim that "numerous rambling motions" called into question defendant's mental competency to waive counsel; "[d]efendant's ability to articulate his case and to precisely motion the court are merely measures of his proficiency or lack thereof as a lawyer," and "[h]is ability to represent himself is not indicative of his competence to choose self-representation").

b. Prejudice

Nor can defendant show that he was prejudiced by the timing of the admonishments. In *Wright*, this Court found that the defendant had not been prejudiced by incorrect admonishments where he did "not even make a bare allegation that he would not have proceeded to represent himself" had he known the correct sentence. 2017 IL 119561, ¶ 56. Defendant similarly fails to allege that he would have proceeded with counsel had the court contemporaneously admonished him under Rule 401(a). *See People v. Pike*, 2016 IL App (1st) 122626, ¶ 127 ("there is no evidence to suggest that defendant was prejudiced and would have acted any differently had the court strictly complied with Rule 401(a) on the date it granted defendant's request to proceed *pro se*").

To the extent that defendant suggests that he would have proceeded to trial had the court contemporaneously admonished him, *see* Def. Br. 14, 21, such a claim withers under scrutiny. Defendant's asserted desire to take his case to trial presents an about-face from the position he took in the post-plea proceedings. Although defendant initially told the court that he wanted a "speedy trial," R244, he later told his counsel that he "d[id] not wish" to move to vacate his guilty plea, and instead wanted to challenge only his sentence, R284.

Furthermore, if defendant's decision not to seek to vacate his guilty plea was the product of counsel's advice, that advice was wise. Nothing in

the record suggests that defendant had a viable defense to the robbery charge. And given that the circuit court imposed a lower sentence than the People requested upon considering defendant's guilty plea as a mitigating factor because it "show[ed] conscious[ness] of guilt and remorse," R225, defendant faced the possibility of a considerably longer sentence if convicted after a trial. Accordingly, any claim of prejudice from defendant's waiver of counsel does not pass muster.

* * *

In sum, defendant cannot show a clear or obvious error because the two-step inquiry to find a valid waiver absent strict compliance was satisfied. The circuit court substantially complied with Rule 401(a). And the record "indicates the waiver was made knowingly and intelligently and the trial court's admonishment did not prejudice the defendant's rights." *Reese*, 2017 IL 120011, ¶ 62. Therefore, defendant cannot establish the first requirement for plain-error review.

B. Defendant cannot establish second-prong plain error because the failure to substantially comply with Rule 401(a) is not a constitutional error, much less a structural error.

Even if defendant could show a clear or obvious error, it would not be second-prong plain error.

Second-prong plain error is a "rare" species of the plain-error doctrine's already "narrow and limited" exception to forfeiture rules. *Jackson*, 2022 IL 127256, ¶ 27 (quotation marks omitted). Forfeiture may be excused without

any showing of prejudice, "only in those exceptional circumstances where, despite the absence of objection, application of the rule is necessary to preserve the integrity and reputation of the judicial process." *Id.* ¶ 28 (quotation marks omitted). In short, the error must be structural. *Jackson*, 2022 IL 127256, ¶ 26 ("The second prong of the plain error rule requires a showing of structural error." (cleaned up)).

A structural error is a constitutional error that "def[ies] analysis by 'harmless-error' standards." *Id.* ¶ 49 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991); *see also People v. Moon*, 2022 IL 125959, ¶ 66 (presumption of prejudice for structural errors is driven "at least in part," because of the "'difficulty of assessing the effect of the error'" (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 n.4 (2006))). This Court's test for identifying such errors is comparable to the test employed by the Supreme Court. *See United States v. Davila*, 569 U.S. 597, 611 (2013) (structural errors "are 'fundamental constitutional errors that defy analysis by harmless error standards'" (quoting *Fulminante*, 499 U.S. at 309 (cleaned up)).

As a result, when assessing whether an error is structural, the Court "often look[s] to the types of errors that the United States Supreme Court has found to be structural error." *Jackson*, 2022 IL 127256, ¶ 30. Those errors "include a complete denial of counsel, denial of self-representation at trial, trial before a biased judge, denial of a public trial, racial discrimination in the selection of a grand jury, and a defective reasonable doubt instruction." *Id.*

¶ 29 (citing *Washington v. Recuenco*, 548 U.S. 212, 218 n.2 (2006)). But although the Court is free to find structural errors beyond these six, *see id.* ¶ 30, the test for finding structural error remains co-extensive, *see People v. Stoecker*, 2020 IL 124807, ¶ 23 (as a matter of state law, this Court "has adhered" to the Supreme Court's requirement that "an error qualifies as structural when the error has 'consequences that are necessarily unquantifiable and indeterminate'" (quoting *Gonzalez-Lopez*, 548 U.S. at 150). And like the Supreme Court, the Court employs "a strong presumption that most errors of constitutional dimension are subject to harmless error analysis." *Id.* ¶ 23; *see also Fulminante*, 499 U.S. at 306 ("most constitutional errors can be harmless"). Where the effect of even a "serious" constitutional error is quantifiable, the error is amenable to harmless-error analysis, and hence is not structural. *Stoecker*, 2020 IL 124807, ¶ 25.

Defendant's attempt to show second-prong plain error fails out the gate because a violation of Rule 401(a) is not a constitutional error at all (much less a structural error). Rather, it is merely a violation of a prophylactic rule that is one means of safeguarding a defendant's right to counsel. A violation of a prophylactic court rule is not structural error. Nor is a violation of Rule 401(a) necessarily an indication that the protected constitutional right has been violated, as Rule 401(a) is but one means of protecting that right. Finally, violations of Rule 401(a) are amenable to harmless error review.

1. A failure to substantially comply with Rule 401(a) is not a constitutional error.

a. Violations of prophylactic rules designed to protect fundamental constitutional rights do not constitute structural error.

This case brings to the fore the distinction between substantive constitutional protections and the procedural protections — such as Rule 401(a) — that serve to advance those protections. Violations of the latter are not structural errors.

The law abounds with "prophylactic rules designed to protect fundamental rights where failure to have perfect compliance with the safeguard does not amount to a violation of the fundamental right itself." *People v. Flores*, 2021 IL App (1st) 192219, ¶ 16. In other words, "[r]ules designed to safeguard a constitutional right . . . do not extend the scope of the constitutional right itself," and "violations of judicially crafted prophylactic rules do not violate the constitutional rights of any person." *Chavez v. Martinez*, 538 U.S. 760, 772 (2003); *see also Vega v. Tekoh*, 142 S. Ct. 2095, 2101 (2022) (although warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), are "constitutionally based," a *Miranda* violation is not "tantamount to a violation of the Fifth Amendment").

The distinction between fundamental constitutional protections and mere prophylactic rules is critical to the structural-error analysis here. *See Davila*, 569 U.S. at 610-11. For example, *Davila* concluded that a violation of Rule 11(c)(1) of the Federal Rules of Criminal Procedure's prohibition of

judicial participation in plea discussions is not structural error. *See id.* at 610. There, the Supreme Court reiterated that structural errors are confined to "fundamental constitutional errors that defy analysis by harmless error standards." *Id.* at 611 (cleaned up). A violation of Rule 11(c)(1) does not qualify because the Rule was "adopted as a prophylactic measure . . . not one impelled by the Due Process Clause or any other constitutional requirement." *Id.* at 610; *cf. also United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000) (peremptory challenges "reinforc[e] a defendant's right to trial by an impartial jury" but are "auxiliary" and "not of federal constitutional dimension").

This Court, similarly, has recognized the distinction between constitutional protections and prophylactic rules in second-prong plain error analysis. Prophylactic Illinois Supreme Court Rules are "not discretionary," "have the force of law," and "should be followed," but a violation "does not mandate reversal in every case." *People v. Glasper*, 234 Ill. 2d 173, 189, 193 (2009); *see also Jackson*, 2022 IL 127256, ¶ 36 (same).

Thus, this Court has not found second-prong plain error where the alleged error "does not involve a fundamental right, or even a constitutional protection," but rather "involves a right made available only by rule of this court." *Glasper*, 234 Ill. 2d at 193. That is so even where the Rule helps safeguard a constitutional right, the denial of which would *itself* constitute structural error. For instance, Illinois Supreme Court Rule 431(b)(4) requires

courts to ask potential jurors during voir dire whether they "understand[] and accept[]" that "if a defendant does not testify it cannot be held against him or her." That Rule is principally designed to safeguard the Sixth Amendment right to an impartial jury. *Glasper*, 234 Ill. 2d at 196 (Rule 431(b)(4) was "designed to help ensure that defendants are tried before a fair jury"). But even though a "trial before a biased jury would constitute structural error," a violation of Rule 431(b)(4) does not. *Id.* at 201. As this Court explained, the Rule is merely one means of ensuring jury impartiality. *People v. Thompson*, 238 Ill. 2d 598, 614 (2010) (although "mandatory, Rule 431(b) questioning is only one method of helping to ensure the selection of an impartial jury"; it "is not the only means of achieving that objective").

The same conclusion followed in *Jackson* for the common-law right to poll a jury. *See* 2022 IL 127256, ¶ 36. That right "is designed to help ensure that the defendant is afforded an important constitutional right, i.e., juror unanimity." *Id.* ¶ 33. But the opportunity to poll a jury is not itself constitutionally required, and a violation of the common-law right is not structural error. *Id.* ¶¶ 36, 44. Echoing *Glasper* and *Thompson*, *Jackson* explained that there are "numerous rules and procedures that are designed to ensure that a criminal defendant receives a fair trial as guaranteed by the federal and state constitutions," but "[n]ot all errors in applying or omitting these pretrial and trial rules and procedures constitute structural error that are reviewable under the second prong of Illinois's plain error rule." *Id.* ¶ 36.

The right to poll the jury, *Jackson* continued, is not "indispensable to a fair trial," but rather one of many "safeguards in place to ensure jury unanimity." *Id.* ¶ 46.

For these reasons, defendant's assertion that a Rule 401(a) error is structural because the "right to counsel is . . . fundamental," Def. Br. 20, misses the point. This case concerns a defendant's right to the admonishments under Rule 401(a), which is a "right made available only by rule of this court." *Glasper*, 234 Ill. 2d at 193. That Rule 401(a) is auxiliary to the right to counsel does not establish that its violation is structural error, just as the violations of the prophylactic rules at issue in *Glasper*, *Thompson*, and *Jackson* were not structural errors merely because they bore on a defendant's fundamental rights to an unbiased and impartial jury.

What is more, to say that this case involves the "fundamental" right to counsel is merely half the battle, as constitutional errors are presumptively not structural. *Fulminante*, 499 U.S. at 306; *Stoecker*, 2020 IL 124807, ¶ 23. That presumption is only rebutted where the effect of that error is so unquantifiable that it is not amenable to harmless error analysis. *See id.* ¶ 25; *see also Davila*, 569 U.S. at 611 (same). In fact, the Supreme Court has specifically rejected "an automatic rule of reversal" for errors involving the right to counsel. *Satterwhite v. Texas*, 486 U.S. 249, 257 (1988) (collecting cases); *see also United States Salemo*, 61 F.3d 214, 223 (1995) (Alito, J., concurring) (noting that *Satterwhite* identifies "a number of cases involving

violations of the Sixth Amendment" where the Court "had previously approved of harmless error analysis"). Indeed, the classic error involving the right to counsel — ineffective assistance — is generally reversible only if the defendant establishes prejudice. *Strickland*, 466 U.S. at 687.

In sum, a violation of a prophylactic rule — including certain Illinois Supreme Court Rules — is not second-prong plain error because while prophylactic rules may protect against constitutional violations, they do not themselves confer constitutionally mandated protections.

b. Rule 401(a) is a prophylactic rule that is designed to protect a defendant's right to counsel, but a violation of the Rule does not equate to a violation of the right to counsel.

Rule 401(a) falls squarely in the same category as the prophylactic rules at issue in *Glasper*, *Thompson*, and *Jackson*. The Rule helps safeguard a defendant's right to counsel, as its "purpose . . . 'is to ensure that a waiver of counsel is knowingly and intelligently made.'" *Reese*, 2017 IL 120011, ¶ 62 (quoting *Campbell*, 224 Ill. 2d at 84). Indeed, compliance with Rule 401(a) serves to ease the evidentiary burden of demonstrating that such a waiver was knowing and intelligent. *See People v. Brown*, 80 Ill. App. 3d 616, 622 (1st Dist. 1980) (Rule 401(a) "provide[s] a procedure which will eliminate any doubt that a defendant understands the nature and consequences of the charge against him before a trial court accepts his waiver of the right to counsel."). But it is merely one means to ensure an effective waiver of

counsel, so a violation of the Rule is not a constitutional error, much less a structural one.

Although compliance with Rule 401(a) is required as a matter of state law, *Campbell*, 224 Ill. 2d at 84, the shifting legal landscape since the Rule's enactment confirms that compliance with it is not *constitutionally* required. Rule 401(a)'s admonishments were first included in 1948 as part of the former Rule 27A and have largely gone unchanged since then. In relevant part, Rule 27A provided that a circuit court

> Shall not permit waiver of counsel, or a plea of guilty, by any person accused of a crime for which upon conviction, the punishment shall be imprisonment in the penitentiary, unless the court finds from proceedings had in open court that the accused understands the *nature of the charges against him*, and *the consequences thereof if found guilty*, and understands that he has *a right to counsel* and understandingly waives such right.

Ill. S. Ct. R 27A (amended 1955) (current version at Ill. S. Ct. R. 401(a)) (emphasis added). The "effect of th[e] rule," one commentator explained at the time, "ha[d] been substantially to incorporate the Federal rule, as expressed in *Johnson v. Zerbst*, [304 U.S. 458 (1938),] into the Illinois Rules of Practice and Procedure." Gerald Chapman, *The Right of Counsel Today*, 39 J. CRIM. L. & CRIMINOLOGY 342, 353 (1948-1949). *Zerbst* requires "an intentional relinquishment or abandonment of a known right or privilege" — i.e., a defendant wishing to waive his right to counsel must know of that right in the first place. 304 U.S. at 464.

Context indicates that the drafters were further informed by *Von Moltke v. Gillies*, 332 U.S. 708 (1948) — a plurality decision decided just two months before Rule 27A's drafting. Applying *Zerbst*, four Justices wrote that in the pre-trial context, trial courts had a "solemn duty" to engage in a "thorough[]" inquiry to ensure that there has been "an intelligent and competent waiver by the accused." *Id.* at 723. And in language that tracks the substance of Rule 27A (and now Rule 401), the *Von Moltke* plurality continued:

> The fact that an accused may tell him that he is *informed of his right to counsel* and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the *nature of the charges*, the statutory offenses included within them, the *range of allowable punishments* thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Id. at 724 (emphasis added). Plainly, then, Rule 27A seeks to codify *Zerbst* and *Von Moltke*.

That the drafters of the Rule 401's progenitor derived its admonishments from *Zerbst* and *Von Moltke* makes clear that a failure to comply with the Rule is not a constitutional error, let alone a structural one. *Cf. Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018) (if statutory text "is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it") (quotation marks omitted). Courts have read *Von Moltke's* discussion on the necessary colloquy as merely a "catalog of concerns for trial court consideration, not as a prescribed litany of

questions and answers leading to mandatory reversal in the event that one or more is omitted." *Hsu v. United States*, 392 A.2d 972, 983 (D.C. 1978); *see also Spanbauer v. Burke*, 374 F.2d 67, 72 (7th Cir. 1966) (referring to *Von Moltke*'s "guidelines"). In other words, *Von Moltke* did not hold that a waiver, "to be [constitutionally] valid, must emerge from a colloquy between trial judge and defendant covering every factor" outlined in the plurality's opinion. *Hsu*, 392 A.2d at 983.

Thus, by making a formal colloquy mandatory under Rule 401(a), this Court created a prophylactic rule that provides *more* protections than the constitutional one. This is confirmed by the fact that the constitutional test for a valid waiver is based "not [on] the trial court's express advice, but rather the defendant's understanding." *United States v. Cash*, 47 F.3d 1083, 1088 (11th Cir. 1995) (quotation marks omitted); *see also* Wayne LaFave et al., *Criminal Procedure* § 11.3(b) (4th ed. 2015) ("The critical issue . . . is what the defendant understood — not what the court said[.]"). Indeed, the Supreme Court has stressed that it has not "prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel." *Tovar*, 541 U.S. at 88. Rather, a defendant must simply "'know[] what he is doing'" and make his choice "'with eyes open.'" *Id.* (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). And to achieve that end, "the information a defendant must possess in order to make an intelligent election . . . will depend on a range of case-specific factors,

including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *Id.*

Put differently, the admonishments provided by Rule 401(a) may be *sufficient* to establish a valid waiver in some circumstances, *see id.* at 81 (in the guilty plea context, "[t]he constitutional requirement [under the Sixth Amendment] is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea"), but that does not mean that such admonishments are *necessary*, *see United States v. Hansen*, 929 F.3d 1238, 1251 (10th Cir. 2019) (a "contemporaneous and comprehensive" "*Faretta* hearing," where the court discusses — among other things — the "nature of the charges" and "the range of punishment," is "generally a *sufficient* condition to a knowing waiver, but it is *not* a *necessary* one") (emphasis in the original); *United States ex rel. Walker v. Yurkovich*, No. 10 C 1959, 2010 WL 3937484, at *4 (N.D. Ill. Oct. 5, 2010) ("[T]o say that this information is sufficient to support a waiver's validity is not to say that the information is necessary.").

Several features of Rule 401(a) illustrate how it goes beyond the constitutional minimum. First, Illinois courts primarily focus on the admonishments a defendant receives during the same hearing where the court accepts his waiver, consistent with this Court's dictum that contemporaneous admonishments are "preferable," *see Haynes*, 174 Ill. 2d at

242. In contrast, and consistent with *Tovar*'s "case-specific" inquiry, the constitutional question requires a review on the entire record. *See United States v. Hantzis*, 625 F.3d 575, 580 (9th Cir. 2010) (looking to the "record as a whole," including "prior proceedings in the case" to "confirm[] that [defendant's] waiver was knowing and intelligent"); *United States v. Egwaoje*, 335 F.3d 579, 585 (7th Cir. 2003) (rejecting need for "a formalistic, mechanical approach" to waiver question and emphasizing that "our inquiry at all times is directed to the record as a whole and we ask whether that record supports a knowing and intelligent waiver").

Of course, a formal colloquy contemporaneous to the waiver — such as that prescribed by Rule 401(a) — may be the "preferred," *Lopez v. Thompson*, 202 F.3d 1110, 1117 (9th Cir. 2000) (en banc), "prudent," *Egwaoje*, 335 F.3d at 585, "ideal," *Cash*, 47 F.3d at 1088, or "probably the best way," *United States v. Pawelski*, 651 F. App'x 750, 757 (10th Cir. 2016), to determine that a defendant validly waived counsel. But, again, the Constitution does not *require* a formal hearing or any specific warnings. *See Dallio v. Spitzer*, 343 F.3d 553, 564 n.4 (2d Cir. 2003) (collecting cases). In other words, a formal colloquy such as that required by Rule 401(a) is one means of ensuring that a defendant's waiver is constitutionally valid, but not the only means. *See Egwaoje*, 335 F.3d at 585 (rejecting necessity of a "*Miranda*-style prophylactic approach" to waiver question); *Pawelski*, 651 F. App'x at 757 (formal hearing "only a means to an end of ensuring a voluntary and intelligent waiver, and

the absence of that means is not error as a matter of law") (quotation marks omitted); *United States v. Hafen,* 726 F.2d 21, 26 (1st Cir. 1984) ("Although the practice of issuing specific warnings to defendants who wish to proceed *pro se* is a good way . . . to [e]nsure that the requirements of *Faretta* are met, it is not the *only* way.") (emphasis in original).

Second, and unlike the approach adopted by the Supreme Court in *Tovar*, Rule 401(a) is indifferent to any "case specific factors" and prescribes a one-size-fits-all approach. As *Tovar* explains, the Sixth Amendment "require[s] less rigorous warnings pretrial," "not because pretrial proceedings are 'less important' than trial, but because, at that stage, 'the full dangers and disadvantages of self-representation . . . are less substantial and more obvious to an accused than they are at trial.'" 541 U.S. at 90 (quoting *Patterson v. Illinois*, 487 U.S. 285, 298 (1988), which calls for a "pragmatic approach to the waiver question"). A waiver of counsel at trial, in contrast, requires that a defendant be "warned specifically of the hazards ahead," and "'should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing.'" *Id.* at 89 (quoting *Faretta*, 422 U.S. at 835).

In contrast, Rule 401(a) is wholly indifferent to the stage of proceeding and requires substantial compliance regardless of when a defendant waives counsel. *See Campbell*, 224 Ill. at 84. Indeed, substantial compliance is required regardless of any other "case specific factors," including where — as

here — the charges are not complex, the defendant knows of his sentencing exposure, and the defendant has *already* invoked his right to appointed counsel and has been represented by a public defender for several months. *See supra* Part II.A.2.

Third, and finally, Rule 401(a)'s admonishments are mandatory even if the Sixth Amendment right to counsel has not attached. This Court has said that "the scope of Rule 401's express-waiver requirement is defined by the plain language of the rule, not by the scope of the sixth amendment right to counsel." *Campbell*, 224 Ill. 2d at 87. In part, this means that substantial compliance is required even if a defendant's right to counsel arises by statute, and not under the Sixth Amendment. *See id.* at 85 ("Illinois provides a right to counsel that is broader than the sixth amendment right to counsel"). That reaffirms that Rule 401(a) provides a prophylactic rule that is more protective than the constitutional right itself. Put differently, it makes clear that a court could violate Rule 401(a) without violating the Sixth Amendment. Thus, a failure to substantially comply with Rule 401(a) is not necessarily a violation of a defendant's Sixth Amendment right, and it is therefore not comparable to the fundamental constitutional errors that the Supreme Court has deemed to be structural. *See Davila*, 569 U.S. at 611.

To be sure, a State may "go beyond the minimum constitutional requirements" and "insist, as a matter of state law, that a valid waiver always be conditioned on the trial judge having specifically advised the

defendant as to the nature of the offense charge, possible punishments, and related matters." LaFave, *supra*, § 11.3(b). Illinois has done so. But although failure to substantially comply with Rule 401(a) is an error, it is not a *constitutional* error, and hence not structural.

2. Regardless, a violation of Rule 401(a) does not defy analysis under the harmless error standard that governs even most constitutional violations.

In any event, a failure to substantially comply with Rule 401(a) does not defy analysis by harmless error standards. Rather, the effect of a Rule 401(a) error is quantifiable, and hence the error is not structural. *See Stoecker*, 2020 IL 124807, ¶ 23; *see also Jackson*, 2022 IL 12756, ¶ 49 (error "is not structural" where it is "amenable to harmless error analysis").

"[T]he failure to comply with nonconstitutional warning and inquiry requirements may be treated as harmless error." *LaFave*, *supra*, § 11.5(c) at n.56 (collecting cases). In the absence of a prescribed formal colloquy, reviewing courts consider the *effect* of that error; in other words, whether the error resulted in an unknowing, unintelligent, or involuntary waiver of the right to counsel. *See Dallio*, 343 F.3d at 563 & n.4. That question "is directed to the record as a whole," and is not limited to the narrow question of what a defendant was told immediately before going pro se. *Egwaoje*, 335 F.3d at 585; *see also Hantzis*, 625 F.3d at 580 (same).

To be sure, *Campbell* held that vacatur of defendant's conviction was appropriate "where was no compliance, substantial or otherwise, with Rule

401(a)." 224 Ill. 2d at 84. And it did so without considering whether the waiver was otherwise knowing, intelligent, and voluntary. *See id.* But *Campbell* did not hold that a failure to substantially comply with Rule 401(a) is *never* amenable to harmless error analysis. Indeed, the People did not argue in *Campbell* that defendant otherwise knowingly, intelligently, and voluntarily waived his right to counsel despite the failure to comply with Rule 401(a). *See generally* Br. Arg. Pl.-Appellant, *People v. Campbell*, 2006 WL 4526813 (Ill.).

Indeed, this Court's substantial-compliance test demonstrates that the effect of a Rule 401(a) error is quantifiable. Where there has been substantial compliance, the next step is to assess whether the "waiver was made knowingly and voluntarily." *Haynes,* 174 Ill. 2d at 236. That necessarily incorporates the test for whether the waiver was constitutionally valid. Put differently, this test asks whether the failure to strictly comply with Rule 401(a) harmed the defendant as judged by the Sixth Amendment waiver standard. An error where the court falls short of substantial compliance with Rule 401(a) is equally amenable to this inquiry. Accordingly, even when there has not been substantial compliance with Rule 401(a), the error is subject to review for harmlessness, and it follows that any such error is not structural.

* * *

In sum, no clear or obvious error occurred, but even if it did, defendant cannot excuse his forfeiture because the circuit court did not commit second-prong plain error. A Rule 401(a) violation does not involve the deprivation of a fundamental right, but rather a prophylactic "right made available only by rule of this court." *Glasper*, 234 Ill. 2d at 193. And the effect of a violation of Rule 401(a)'s prophylactic rule is amenable to harmless error analysis, as the ultimate question remains whether defendant knowingly and intelligently waived his right to counsel. *Reese*, 2017 IL 120011, ¶ 62.

CONCLUSION

This Court should vacate the appellate court's judgment and dismiss this appeal. Alternatively, this Court should affirm the judgment.

October 3, 2023

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RULE 341(c) 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 or words contained in 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 49 pages.

/s/ Matthew D. Skiba
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CERTIFICATE OF FILING AND SERVICE

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 October 3, 2023, the foregoing **Brief of Plaintiff-Appellee 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:

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