No. 122187

IN THE

SUPREME COURT OF ILLINOIS

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| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellant,<br><br>-vs-<br><br>JORDAN EASTON<br><br>Defendant-Appellee. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Appellate Court of Illinois, No. 2-14-1180.<br><br>There on appeal from the Circuit Court of the 23rd Judicial Circuit, Kendall County, Illinois, No. 13 CF 333, 14 CF 24, 14 CF 53, 14 CF 138, 14 CF 139. and 14 CF 140.<br><br>Honorable Timothy J. McCann, Judge Presiding. |

# BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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**POINTS AND AUTHORITIES** Page

**I.**



**II.**

## RULES INVOLVED

**Supreme Court Rule 604(d) (eff. Feb. 6, 2013):**

...The defendant's attorney shall file with the trial court a certificate stating that the attorney has consulted with the defendant either by mail or in person to ascertain defendant's contentions of error in the sentence or the entry of the plea of guilty, has examined the trial court file and report of proceedings of the plea of guilty, and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings...

**Supreme Court Rule 604(d) (eff. Mar. 8, 2016):**

...The defendant's attorney shall file with the trial court a certificate stating that the attorney has consulted with the defendant either by phone, mail, electronic means or in person to ascertain defendant's contentions of error in the sentence and the entry of the guilty plea, has examined the trial court file and both the report of proceedings of the plea of guilty and the report of proceedings in the sentencing hearing and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings....

## STATEMENT OF FACTS

The State's statement of facts is sufficient to frame the issues on appeal.

## Standard of Review

The temporal reach of a statute or rule is a question of law that this Court reviews *de novo*. *People v. Hunter*, 2017 IL 121306, ¶ 15. The sufficiency of counsel's 604(d) certificate is also reviewed *de novo*. *People v. Tousignant*, 2014 IL 115329, ¶ 8.

## ARGUMENT

### I. Plea counsel's certificate did not comply with pre-amended Rule 604(d)

On February 21, 2014, this Court held in *People v. Tousignant* that Supreme Court Rule 604(d) required counsel "to certify that he has consulted with the defendant 'to ascertain defendant's contentions of error in the sentence *and* the entry of the plea of guilty.'" *Tousignant*, at ¶ 20. (emphasis in original).

On October 25, 2014, Mr. Easton's attorney filed a motion to reconsider sentence, along with a 604(d) certificate which read:

> I have consulted with the Defendant in person to ascertain his contentions of error in the imposition of the sentence *or* the entry of plea of guilty. (C. 68). (emphasis added).

The certificate's use of "or" instead of "and" undermines the purpose of 604(d), while also failing to follow this Court's explicit instructions in *Tousignant*. This Court should therefore affirm the appellate court's decision

in this case and remand the case to the trial court for new post-plea proceedings in full compliance with Rule 604(d). *People v. Janes*, 158 Ill.2d 27, 33 (1994).

The primary purpose of Rule 604(d)'s certificate requirement is "to enable the trial court to ensure that defense counsel has considered *all* relevant bases for the motion to withdraw the guilty plea or to reconsider the sentence" so that "any improper conduct or other alleged improprieties that may have produced a guilty plea are brought to the trial court's attention" when witnesses are available and memories fresh. *Tousignant*, at ¶ 16. (emphasis in original). To effectuate that purpose, this Court in *Tousignant* interpreted "or" in Rule 604(d)'s consultation phrase to mean "and." *Id.* ¶ 20. Accordingly, this Court held, "counsel is required to certify that he has consulted with the defendant 'to ascertain defendant's contentions of error in the sentence *and* the entry of the plea of guilty,'" even in instances where only a motion to reconsider has been filed. *Id.* (emphasis in original). This Court reasoned that employing the literal meaning of "or" would thwart 604(d)'s purpose, and "fall short of assuring the trial court that counsel had reviewed the defendant's claim and considered *all* relevant bases for the post-plea motion." *Id.* at ¶¶ 18-20. (emphasis in orignal).

The State argues that in light of *Tousignant*, when Mr. Easton's defense counsel wrote "or" in her certificate she effectively wrote "and." (St.'s Br. 8). However, employing that interpretation of "or" would again undermine the purpose of 604(d). *People v. Hobbs*, 2015 IL App (4th) 130990,

¶¶ 34-36; *People v. Mason*, 2015 IL App (4th) 130946, ¶ 13. According to *Tousignant* "or" meant "and" in Rule 604(d) only because that meaning furthered the purpose of the Rule, not because "or" truly meant "and." *Tousignant*, at ¶ 20. Here, interpreting "or" to mean "and" when used in a Rule 604(d) certificate does not further the purpose of 604(d). A judge reading a certificate that uses "or" could not be assured that all relevant bases were covered. It could be possible, for instance, that defense counsel used "or" in the disjunctive, and only consulted with the defendant about either the guilty plea or the sentence, not both.

Allowing use of "or" would also fail to address the courts' interest in ensuring the finality of judgments and preventing potential abuse of the criminal justice system. *People v. Wilk*, 124 Ill.2d 93, 103 (1988)(stating that Rules 402, 604(d) and 605(b) are meant not only "to ensure that defendant's constitutional rights are protected, but also to avoid abuses by defendants.") Here, counsel filed only a motion to reconsider sentence along with a 604(d) certificate stating that she consulted with the defendant about the guilty plea "or" the sentence. (C. 68). Because counsel used "or," the certificate failed to state definitively that counsel spoke to the defendant about his guilty plea. If Mr. Easton were to later file a post-conviction petition raising errors in the entry of his plea, and claiming deficient representation by plea counsel, counsel's certificate would fail to rebut a claim that she did not discuss with him all potential errors before filing the post-plea motion. Such ambiguity therefore leaves room for piecemeal litigation while also frustrating the goal

of finality in guilty pleas.

The State's interpretation of *Tousignant* also fails to consider that the majority opinion expressly stated,

> Under this reading [of Rule 604(d)], counsel is required to certify that he has consulted with the defendant 'to ascertain defendant's contentions of error in the sentence *and* the entry of the plea of guilty. *Id.* (emphasis in original).

Justice Karmeier, although in dissent, also understood *Tousignant* as requiring that henceforth counsel would need to use "and" instead of "or" in the certificate:

> What the majority is actually saying is that the rule should be read as follows:
>
> > The defendant's attorney shall file with the trial court a certificate stating that the attorney has consulted with the defendant either by mail or in person to ascertain defendant's contentions of error, *and to discuss any other errors*, in *both* the sentence *and* the entry of the plea of guilty, has examined the trial court file and report of proceedings of the plea of guilty *and sentencing* ...' Karmeier, J., dissenting, at ¶ 49. (emphasis in original).

The State additionally argues that "or" sufficed because *Tousignant* did not amend Rule 604(d) and thereby change the actual language required in a 604(d) certificate. (St.'s Br. 7). As support for its argument, the State notes that *Tousignant* "rejected the People's argument [made in a reply brief] that it should amend the rule." (St.'s Br. 7). The State also cites Justice Thomas' belief, stated in *Tousignant*, that 604(d) should be amended to more "accurately" reflect 604(d)'s intent. (St.'s Br. 7). *Tousignant's* majority opinion, however, never mentioned the State's suggested amendment, which hardly acts as an outright rejection. Additionally, Justice Thomas'

recommendation that 604(d) be amended actually detracts from the State's argument. *Id.* at ¶ 27. *Tousignant's* majority opinion interpreted 604(d) to mean that attorneys must certify that they consulted about both the sentence *and* the guilty plea. *Id.* Because Justice Thomas called for an amendment to more "accurately" reflect that intent as determined by the *Tousignant* majority, he made clear that 604(d)'s intent was always the same: counsel must "certify that he has consulted with the defendant 'to ascertain defendant's contentions of error in the sentence *and* the entry of the plea of guilty.'" *Tousignant*, at ¶ 20. (emphasis in original). In other words, Justice Thomas's suggested amendment would not have changed 604(d)'s requirement, it would have just made that requirement more apparent.

In sum, because *Tousignant* determined that the intent of 604(d) requires certification that counsel has consulted with the defendant about both the sentence and guilty plea, an intent later clarified by this Court's amendment of the Rule effective March 8, 2016, the certificate of Easton's plea counsel which failed to certify that she consulted with him regarding both the sentence *and* guilty plea, violated Rule 604(d) as in effect at the time counsel filed her certificate. Therefore Easton's case must be remanded for a new post-plea proceeding held in full compliance with Rule 604(d). *Janes*, 158 Ill.2d at 33.

**II. The version of Rule 604(d) in effect on March 8, 2016 should apply retroactively to Jordan Easton's case.**

Defense counsel's 604(d) certificate does not comply with the current version of Rule 604(d). On March 8, 2016, this Court amended Illinois Supreme Court Rule 604(d) to require that when a defendant files a timely post-plea motion, trial counsel must certify that she consulted with the defendant about his "contentions of error in the imposition of the sentence *and* the entry of the guilty plea" and certify that she examined "*both* the report of proceedings of the plea of guilty and the report of proceedings in the sentencing hearing." Sup. Ct. R. 604(d) (eff. Mar. 8, 2016)(emphasis added). In her certificate, filed on October 25, 2014, counsel did not certify that she consulted with Mr. Easton about both the sentence and the guilty plea. (C. 68). Counsel also failed to certify that she examined the report of proceedings of the sentencing hearing. (C. 68). Because the amendment concerns a procedural rule that clarifies the pre-amended rule's intent, it should be applied retroactively to Mr. Easton's case. *People v. Ramsey,* 192 Ill.2d 154, 167 (2000) (Bilandic, J., concurring). Accordingly, this Court should remand this case for further post-plea proceedings in strict compliance with the current version of Rule 604(d).

Retroactivity serves a vital purpose; it halts the lingering use of a law that has already been found wanting. *Landgraf v. USI Film Products,* 511 U.S. 244, 259 (1994). "An amendment to a statute can be given retroactive effect if it is designed to merely carry out or explain the intent of the original legislation." 2 Singer, Sutherland Statutory Construction § 41:11 (7th ed.

Westlaw 2017). An amendment that clarifies ambiguity in a prior law may be applied retroactively to achieve the rule's intent. *In re Marriage of Cohn*, 93 Ill.2d 190, 202 (1982); See also *People v. Ramsey,* 192 Ill.2d at 167 (Bilandic, J., concurring). "Remedial statutes are to be liberally construed and if a retroactive interpretation will promote the ends of justice, they should receive such construction." *Landgraf,* 511 U.S. at Footnote 16 (quoting from Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed; 3 Vand.L.Rev. 395 (1950)).

The text of Rule 604(d) in effect when counsel filed her certificate stated:

> The defendant's attorney shall file with the trial court a certificate stating that the attorney has consulted with the defendant either by mail or in person to ascertain defendant's contentions of error in the sentence or the entry of the plea of guilty, has examined the trial court file and report of proceedings of the plea of guilty and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings. Sup. Ct. R. 604(d)(2013)

In *Tousignant*, this Court interpreted the above language to require counsel to certify that she has consulted with defendant "to ascertain defendant's contentions of error in the sentence *and* the entry of the guilty plea." *Tousignant*, 2014 IL 115329, ¶ 20 (emphasis in original). In his concurrence, Justice Thomas called for 604(d) to be amended "to more accurately reflect this Court's intent" in *Tousignant.* ¶ 27. On March 8, 2016, this Court amended 604(d), replacing the word "or" with "and" in the phrase, "consulted with the defendant...to ascertain defendant's contentions of error in the sentence *and* the entry of the plea of guilty." Sup. Ct. R. 604(d) (eff. Mar. 8,

2016). The amendment also stated that counsel must certify that she examined both the report of proceedings of the  and the report of proceedings of the sentencing hearing. Sup. Ct. R. 604(d) (eff. Mar. 8, 2016).

Unlike the statutory amendment addressed in *People v. Hunter*, 2017 IL 121306, the amendment to 604(d) was not a change in policy, it was an amendment designed to clarify the intent of the rule. It should therefore be applied retroactively to Easton's certificate to effectuate the intent of Rule 604(d). See *Commonwealth Edison Co. v. Department of Local Government Affairs*, 85 Ill.2d 495, 502-506 (1981) (retroactively applying statutory amendment clarifying an ambiguous law so as to invalidate a tax assessed under the pre-amended law).

The State disagrees. Citing *Hunter's* application of Section 4 of the Statute on Statutes, the State argues that amended Rule 604(d) should only apply to certificates filed *after* the amended rule became effective. (St.'s Br. 6). The State's argument employs a mechanical application of Section 4, resulting in an outcome that undermines and ignores 604(d)'s intent, a method that *Hunter* opposed. *Hunter*, at ¶ 28 (stating that "statutory construction requires more than mechanical application" and statutes should be read to avoid results that "the legislature could not have intended.")

*Hunter* involved a defendant who, in 2011, was 16 years old when he committed armed robbery, aggravated kidnaping, and aggravated vehicular hijacking. *Id.* at ¶ 4. Following an automatic transfer from juvenile to adult court and a bench trial, he was convicted on all three counts. *Id.* at ¶ 6. On

May, 29, 2014, the court sentenced him to 21 years imprisonment, including a 15-year sentencing enhancement for using a firearm during the offense. *People v. Hunter* 2016 IL App (1st) 141904, ¶ 11. On January 1, 2016, while Hunter's case was pending on appeal, the legislature amended the transfer statute, eliminating armed robbery and aggravated vehicular hijacking while armed with a firearm from the list of automatic transfer cases. *Hunter*, 2017 IL 121306, ¶ 8. Although Hunter had been tried, convicted, and sentenced, and had already filed an opening brief for his direct appeal, he argued in a supplemental brief for retroactive application of the amended transfer statute to his case. *Hunter*, 2016 IL at ¶ 34. This Court refused to apply the statute retroactively, finding that a "remand under such circumstances would create inconvenience and a waste of judicial resources–a real-world result that the General Assembly could not have intended." *Hunter*, 2017 IL at ¶ 36. This Court noted that Hunter was now 22 years old and had aged out of the juvenile system. *Id.* at ¶ 38. This Court also reasoned that a remand would be inappropriate because Hunter's proceedings in the circuit court had concluded and "nothing remains to be done." *Id.* at ¶ 32.

In Mr. Easton's case, retroactive application of amended 604(d) would not lead to the type of absurdity entailed in sentencing a 22-year-old under a juvenile statute for a crime that he had committed five years earlier, for which he had already been sentenced under the statute then in effect, and for which a juvenile sentence was no longer viable. Instead, retroactively applying amended Rule 604(d) to Easton's certificate would achieve the result

intended by 604(d), an intent explicitly stated in *Tousignant*. It would allow the defense attorney to correct an ambiguous certificate that failed to ensure the court that plea counsel consulted with the defendant about both the guilty plea and the sentence and raised all issues the defendant wished to pursue.

Additionally, unlike *Hunter*, Easton's pending appeal pertained to the very issue that the rule change applied to—whether or not his guilty plea and sentence were proper, a procedure governed by Rule 604(d). (C. 68). It is therefore not true, as it was in *Hunter*, that nothing remained to be done; the appellate court still needed to determine whether plea counsel complied with 604(d) and whether all relevant bases for challenging Easton's plea and sentence had been considered. By contrast, when Hunter filed his appeal, he had no issue pertaining to his juvenile status. Only after the legislature amended the juvenile statute did an issue arise as to the scope of the transfer process and only then did he file a supplemental briefing on that issue. *Hunter*, 2016 IL at ¶ 34.

Contrary to the State's argument, (St.'s Br. 6), this Court has applied amended procedural rules to proceedings that occurred before the new rule became effective. See *Commonwealth Edison Co. v. Department of Local Government Affairs*, 85 Ill.2d at 502-506, cited above; see also *First of American Trust Co. v. Armstead*, 171 Ill.2d 282, 284 (1996) (retroactively applying statutory amendment allowing the registration of underground storage tanks to plaintiff's pre-amendment failed attempt to register his

storage tank); *In re Pronger*, 118 Ill.2d 512, 519-521 (1987) (retroactively applying statutory amendment concerning adequacy of summons to a summons served three years before the amendment took effect). Here, too, this Court should apply amended 604(d) retroactively to Easton's case because it is a procedural rule that was amended to cure a defect in the prior law and it achieves Rule 604(d)'s intent.

The certificate of Easton's plea counsel failed to comply with amended 604(d) in two ways. First, it used the word "or" instead of "and" in the consultation phrase. (C. 68). Second, counsel certified that she read the report of proceedings of the guilty plea, but did not certify that she read the transcript of the sentencing hearing. (C. 68). This Court should remand Easton's case for a new post-plea proceeding that is in full compliance with newly amended Rule 604(d). *People v. Janes*, 158 Ill.2d 27, 33 (1994).

## CONCLUSION

For the foregoing reasons, Jordan Easton respectfully requests that this Court affirm the appellate court's decision and remand this case for a new post-plea proceeding in strict compliance with Supreme Court Rule 604(d).

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I, Andrew Smith, 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 12 pages.

/s/Andrew Smith
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**NOTICE AND PROOF OF SERVICE**

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On May 9, 2018, the Brief and Argument of Defendant-Appellee 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. One copy is also being mailed to the defendant in an envelope deposited in a U.S. mailbox in Elgin, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Vinette Mistretta
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