No. 126116

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- DENZAL STEWART, Defendant-Appellee.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-18-0014. There on appeal from the Circuit Court of Cook County, Illinois, No. 16 CR 60199. Honorable Joseph M. Claps, Judge Presiding.

BRIEF OF APPELLEE.
CROSS-RELIEF REQUESTED.

JAMES E. CHADD
State Appellate Defender

DOUGLAS R. HOFF
Deputy Defender

GINGER LEIGH ODOM
Director of Expungement
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

ORAL ARGUMENT REQUESTED

E-FILED
11/24/2021 9:25 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

TABLE OF CONTENTS AND POINTS AND AUTHORITIES

ISSUES PRESENTED FOR REVIEW

I. In the trial court, the State used a 2013 residential burglary offense committed when Denzal was 17 years old, as the basis for his Class X sentence. That offense, if committed in 2017, would no longer be tried in adult court. Under 730 ILCS 5/5-4.5-95(b), which says "now" classified, was Denzal ineligible to be sentenced as a Class X offender?

II. Denzal was under 21 at the time of **all** offenses used to impose a mandatory Class X sentence. Section 5-4.5-95(b) of the Code of Corrections bases its applicability on date of conviction and not date of offense. Where a defendant can "age into" a mandatory sentence, does §95(b) violate the proportionate penalties clause of the Illinois constitution, as well as the *ex post facto*, due process, and equal protection clauses of the Illinois and United States Constitutions? (Cross-relief requested)

STATUTES INVOLVED

730 ILCS 5/5-4.5-95, General Recidivism Provisions (in effect in 2017)

***

(b) When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now (the date the Class 1 or Class 2 felony was committed) classified in Illinois as a Class 2 or greater Class felony and those charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender. This subsection does not apply unless:

(1) the first felony was committed after February 1, 1978 * * *;

(2) the second felony was committed after conviction on the first; and

(3) the third felony was committed after conviction on the second. * * *

730 ILCS 5/5-4.5-95, General Recidivism Provisions (effective July 1, 2021)

***

(b) When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 forcible felony after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now (the date the Class 1 or Class 2 forcible felony was committed) classified in Illinois as a Class 2 or greater Class forcible felony and those charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender. This subsection does not apply unless:

(1) the first forcible felony was committed after February 1, 1978 * * *;

(2) the second forcible felony was committed after conviction on the first;

(3) the third forcible felony was committed after conviction on the second; and

(4) the first offense was committed when the person was 21 years of age or older.

705 ILCS 405/5-120, Exclusive jurisdiction. (2017)

Proceedings may be instituted under the provisions of this Article concerning any minor who prior to his or her 18th birthday has violated or attempted to violate, regardless of where the act occurred, any federal, State, county or municipal law or ordinance. Except as provided in Sections 5-125, 5-130, 5-805, and 5-810 of this Article, no minor who was under 18 years of age at the time of the alleged offense may be prosecuted under the criminal laws of this State.

705 ILCS 405/5-130, Excluded jurisdiction. (Eff. January 1, 2016)

(1)(a) The definition of delinquent minor under Section 5-120 of this Article shall not apply to any minor who at the time of an offense was at least 16 years of age and who is charged with: (i) first degree murder, (ii) aggravated criminal sexual assault, or (iii) aggravated battery with a firearm as described in Section 12-4.2 or subdivision (e)(1), (e)(2), (e)(3), or (e)(4) of Section 12-3.05 where the minor personally discharged a firearm as defined in Section 2-15.5 of the Criminal Code of 1961 or the Criminal Code of 2012.

***

705 ILCS 405/5-805, Transfer of jurisdiction. (Eff. January 1, 2016)

(2) Presumptive transfer.

(a) If the State's Attorney files a petition, at any time prior to commencement of the minor's trial, to permit prosecution under the criminal laws and the petition alleges a minor 15 years of age or older of an act that constitutes a forcible felony under the laws of this State, and if a motion by the State's Attorney to prosecute the minor under the criminal laws of Illinois for the alleged forcible felony alleges that (i) the minor has previously been adjudicated delinquent or found guilty for commission of an act that constitutes a forcible felony under the laws of this State or any other state and (ii) the act that constitutes the offense was committed in furtherance of criminal activity by an organized gang, and, if the juvenile judge assigned to hear and determine motions to transfer a case for prosecution in the criminal court determines that there is probable cause to believe that the allegations in the petition and motion are true, there is a rebuttable presumption that the minor is not a fit and proper subject to be dealt with under the Juvenile Justice Reform Provisions of 1998 (Public Act 90-590), and that, except as provided in paragraph (b), the case should be transferred to the criminal court.

***

(3) Discretionary transfer.

(a) If a petition alleges commission by a minor 13 years of age or over of an act that constitutes a crime under the laws of this State and, on motion of the State's Attorney to permit prosecution of the minor under the criminal laws, a Juvenile Judge assigned by the Chief Judge of the Circuit to hear and determine those motions, after hearing but before commencement of the trial, finds that there is probable cause to believe that the allegations in the motion are true and that it is not in the best interests of the public to proceed under this Act, the court may enter an order permitting prosecution under the criminal laws.

(b) In making its determination on the motion to permit prosecution under the criminal laws, the court shall consider among other matters:

(i) the age of the minor;

(ii) the history of the minor, including:

(A) any previous delinquent or criminal history of the minor,

(B) any previous abuse or neglect history of the minor, and

(C) any mental health, physical, or educational history of the minor or combination of these factors;

(iii) the circumstances of the offense, including:

(A) the seriousness of the offense,

(B) whether the minor is charged through accountability,

(C) whether there is evidence the offense was committed in an aggressive and premeditated manner,

(D) whether there is evidence the offense caused serious bodily harm,

(E) whether there is evidence the minor possessed a deadly weapon;

(iv) the advantages of treatment within the juvenile justice system including whether there are facilities or

programs, or both, particularly available in the juvenile system;

(v) whether the security of the public requires sentencing under Chapter V of the Unified Code of Corrections:

(A) the minor's history of services, including the minor's willingness to participate meaningfully in available services;

(B) whether there is a reasonable likelihood that the minor can be rehabilitated before the expiration of the juvenile court's jurisdiction;

(C) the adequacy of the punishment or services.

In considering these factors, the court shall give greater weight to the seriousness of the alleged offense, the minor's prior record of delinquency than to the other factors listed in this subsection.

***

705 ILCS 405/5-810, Extended jurisdiction juvenile prosecutions.

(1)(a) If the State's Attorney files a petition, at any time prior to commencement of the minor's trial, to designate the proceeding as an extended jurisdiction juvenile prosecution and the petition alleges the commission by a minor 13 years of age or older of any offense which would be a felony if committed by an adult, and, if the juvenile judge assigned to hear and determine petitions to designate the proceeding as an extended jurisdiction juvenile prosecution determines that there is probable cause to believe that the allegations in the petition and motion are true, there is a rebuttable presumption that the proceeding shall be designated as an extended jurisdiction juvenile proceeding.

***

STATEMENT OF FACTS

Summary of relevant facts and issues before this Court

In July 2013, when Denzal Stewart was a minor of 17 years old, he was arrested and charged with residential burglary, a Class 2 felony. (S. C. 46) In October 2013, Denzal, still 17, entered a guilty plea to that offense. (S. C. 46) In December 2014, at the age of 18, he entered a plea of guilty to possession of a stolen motor vehicle (PSMV). (S. C. 46) In August 2016, Denzal, then 20 years old, was charged with the instant offense, one count of PSMV. (R. 14, 15) Denzal turned 21 years old during the pendency of the pre-trial proceedings. He was convicted by a jury. (R. 347; S.C. 43) Based on the two prior offenses, the trial court sentenced him to a Class X term of six years in prison, to be followed by a three-year term of mandatory supervised release (MSR). (R. 371-72; C. 103) [1]

On appeal, the appellate court vacated Denzal's Class X sentence and remanded for resentencing to a Class 2 term, finding that Denzal's 2013 residential burglary, committed when he was 17 years old, "had it been committed under the laws in effect on August 13, 2016, would have been resolved through delinquency proceedings," so that the burglary was "not 'an offense now * * * classified in Illinois as a Class 2 or greater Class felony.' " *People v. Stewart*, 2020 IL App (1st) 180014-U, ¶ 32, citing *People v. Miles*, 2020 IL App (1st) 180736, ¶ 11; 730 ILCS 5/5-4.5-9.5(b).

---

[1] During the proceedings on the instant PSMV charge, Denzal was released on electronic monitoring. He was injured and missed a court date, and was then charged with escape under case no. 16 CR 1601401. (R. 9-11, 14, 23-24)

The State filed a petition for leave to appeal (PLA) with this Court. In its PLA, the State argued *inter alia* that the appellate court's ruling conflicts with *Fitzsimmons v. Norgle*, 104 Ill.2d 369 (1984). Furthermore, in a reversal of its position in the appellate court, the State claimed for the first time in its opening brief in this Court, that the appellate court's reliance on this Court's decision in *People v. Taylor*, 221 Ill. 2d 157 (2006), is misplaced.

Denzal responds that the appellate court decision was correct, and that in 2017, Stewart's residential burglary offense from when he was 17 would have been resolved through delinquency proceedings, and was therefore not a qualifying prior conviction for purposes of the Class X sentencing statute. The trial facts from are set forth below.

Pre-trial proceedings

Through counsel, Denzal sought to resolve his case through a disposition other than a prison term.

In October 2016, Assistant Public Defender (APD) Debra Gassman stated that the 20-year old Denzal was "on medication," [2] and asked that he be evaluated for boot camp, which the court allowed. (R. 20, 27, 30); 730 ILCS 5/5-8-1.1. In December 2016, APD Gassman announced that Denzal was not accepted to boot camp because of his mental health status. (R. 39)

Also in December 2016, APD Gassman explained to the court that Denzal wanted to resolve the case with a disposition of probation, but

---

[2] The PSI reflects that Denzal has Attention Deficit Hyperactivity Disorder (ADHD) and bipolar disorder, and that he was taking Depakote. (S.C. 47, 49, 50)

because he had prior Class 1 and Class 2 convictions in his background, he was "not eligible for any type of probation." (R. 33-34) Denzal had previously been given TASC probation, which he had not successfully completed. (R. 34); 20 ILCS 301/40-5. The court explained to Denzal that he was not eligible for probation. (R. 35); 730 ILCS 5/5-5-3(c)(2)(C). APD Gassman then sought to have Denzal evaluated for mental health probation. (R. 39); 730 ILCS 168/1 *et seq*.

On February 2, 2017, while Denzal was still 20 years old, the State tendered a plea offer of three years in prison, and held it open until the following court date. (R. 42) At the next court date, on February 27, 2017, APD Michael Biel appeared for Denzal. (R. 45) The State stated that it had previously extended a plea offer for "less than a Class X"and that Denzal had rejected it. (R. 45) APD Biel requested evaluations both for TASC and drug court, noting that Denzal did not qualify for mental health probation. (R. 45)

In March 2017, APD Biel reported that TASC found Denzal acceptable. (R. 48) The State responded that Denzal was not eligible for TASC because he had received TASC in the past, and that he was not probationable. (R. 48) APD Biel agreed that a defendant may only get TASC once, and that as charged, Denzal did not qualify for Adult Re-Deploy, drug court, or mental health probation. (R. 48-49) APD Biel then stated:

> When my client was arrested and charged with the possession of stolen motor vehicle, he was 20 years old. Because he was only 20 years old, Judge, he is not X mandatory. On June first of this year, he turns 21 years old. As a result of that birthday, he will then be X mandatory by law, by statute. I did let my client know that. I just wanted to make that record. (R. 49-50)

Counsel then asserted that Denzal sought a 402 conference, but because the State had offered the minimum term, counsel opined that a conference was not "worthwhile." (R. 51) Nonetheless, the court admonished Denzal about the 402 conference, and Denzal agreed that the court should participate. (R. 51-52) The State again offered the minimum prison sentence on both charges: three years in prison on the PSMV and two years on the escape, to be served consecutively. The court agreed to go along with the State's recommendation. The court recognized that Denzal's drug addiction was driving his criminality, and advised him that his birthday in June would "significantly change" the mandatory minimum. The matter was continued for Denzal to consider the offer. (R. 53)

On April 17, 2017, APD Biel was not in court. Denzal asked for and was granted a continuance to speak with Biel about the court-approved March 2017 offer of a five-year aggregate prison sentence. (R. 56) On May 3, 2017, APD Biel told the court that he was wrong about his position on Class X sentencing. Biel specifically stated:

> it was my belief that based on the law, as of June 1st, when he turned 21 years of age, he would then be X mandatory, Judge. **I do not believe that is the case**. I believe that the X mandatory – the age of when someone is X mandatory is when they are – when the crime is charged. (R. 60)(emphasis added)

Neither the court nor the State responded. Denzal rejected the March 2017 offer of three years' imprisonment. (R. 60)

On the following court date, June 6, 2017, APD Biel asked for a BCX. (R. 64) After the interviews, on August 7, 2017, APD Biel stated there was no reason to conduct a fitness hearing, then asked the court to re-open the 402

conference, to ask for TASC probation once more. (R. 71-72)

The court noted that Denzal had been convicted of residential burglary, and that he had another pending case for the escape charge; both of these rendered Denzal ineligible for TASC probation. (R. 72-73)

The prosecutor stated that Denzal was Class X mandatory at that point, which would mean that the March 2017 offer of three years in prison on the PSMV followed by two years on the escape was invalid; therefore the offer would have to be six years imprisonment plus two years, instead. (R. 74) The State explained that the "recidivist statute" [3] requires the defendant to be 21 years old at the time of the conviction, which Denzal then was. (R. 75)

APD Biel disagreed that Denzal was Class X mandatory. Biel argued that the defendant's age at the time of the alleged commission of the offense triggered the recidivist statute, and because Denzal was only 20 years old at the time he was alleged to have committed PSMV, "in my reading of recent case law, Judge, he will never be Class X mandatory." (R. 75-76)

The court asked the parties to tender the cases in support of their respective interpretations of §95(b). (R. 75-76) APD Biel tendered *People v. Brown*, 2015 IL App (1st) 140508 (2015); the State tendered *People v. Smith*, 2016 IL 119659 (2016). (R. 76, 79) The court followed the *Smith* holding, that the defendant's age at the time of conviction is the deciding factor in determining whether §95(b) applies, making Denzal Class X mandatory. (R. 80) The court held that because Denzal was then 21 years old, the prior offer

[3] 730 ILCS 5/5-4.5-95.

of three years in prison plus two years was no longer valid, and that the minimum was now a six-year prison sentence plus two more years. (R. 82-83)

APD Biel asserted that *Smith* came down in March of 2017,[4] five months earlier, and argued that prior to *Smith*, the date of the offense or charge was the determining factor. (R. 80) Nonetheless, APD Biel agreed that because Denzal was 21 years old, he had become Class X mandatory. (R. 81) The matter was set for trial. (R. 83)

Jury trial and sentencing

At the jury trial, Frankie Tyler testified that on August 11, 2016, he owned a 1997 Chrysler Sebring convertible that was parked in his driveway. (R. 256) The following morning, the car was gone and he reported it stolen. (R. 256-57, 260) A few days later the police located the car and asked him to come look at it. Wires from the steering column were hanging down loose; the car did not look like that when Tyler last saw it. (R. 258) Tyler did not know Denzal and had not given him or anyone permission to take the Chrysler. (R. 258)

Chicago Police Officer Ronald Cavanaugh testified that he was working with his partner Officer Ramirez in full uniform in a marked "squadrol." (R. 274-75) The officers were on routine patrol around 8:45 PM on August 13, 2016, near 113th and Michigan when they spotted a 1997 Chrysler Sebring parked in a no-parking zone. (R. 275) Cavanaugh ran the plates through the on-board system and the system indicated that the car

[4] *Smith* came down in December 2016. 2016 IL 119659 (2016).

was stolen. (R. 275)

Just as the officers received the information, the car started driving away. (R. 276) The officers followed the Chrysler for a few blocks until it came to a stop. (R. 276) Cavanaugh confirmed via car radio that the car was stolen, then the officers pulled up behind the Chrysler and activated the emergency lights. (R. 276) The officers got out and approached the driver's side. (R. 277)

Cavanaugh identified Denzal as the driver of the car, and the only person inside. (R. 277) Cavanaugh could see the steering column as he approached. (R. 278) The plastic housing behind the steering wheel was cracked and damaged, with wires hanging out of the column. (R. 278)

The police ordered Denzal out of the car. He complied and was handcuffed. (R. 278-79) According to Cavanaugh, "[a]s he was being handcuffed, [Denzal] freely admitted that this is my uncle's vehicle. This is my uncle's car. It was stolen earlier. And I just got it back." (R. 279) Neither Cavanaugh nor his partner asked Denzal to write down his statement and sign it, nor did they write it down for him and have him sign it. (R. 293-94) There was no video or tape recording of the statement, only what Cavanaugh put in his report. (R. 293)

After the State rested, the court denied the defense motion for a directed verdict. (R. 300-01) Denzal elected not to testify and the defense rested without presenting evidence. (R. 302-03)

The jury returned a guilty verdict of PSMV. (R. 347); (S. C. 43) The court denied the motion for new trial. (R. 359-62, 363)

Sentencing

Defense counsel and the State agreed that Denzal was Class X mandatory due to prior offenses. (R. 364-65) One of the offenses, residential burglary, occurred in 2013, when Denzal was 17 years old. (S. C. 44, 46) The court sentenced Denzal to the six-year minimum term of imprisonment, recognizing that "except for the change in the law" Denzal could have gotten less than a six-year term. (R. 371) The court also made a boot camp recommendation, stating it was unlikely the camp would accept him because of the medicine he was taking and the escape charge. (R. 370-71) The court ordered a three-year term of mandatory supervised release, and 433 days credit for time served. (C. 103)

Immediately after, Denzal entered a guilty plea to escape in exchange for the minimum two-year prison sentence, to be served consecutively to the PSMV sentence. (R. 373-76)

Direct appeal

Denzal contended on direct appeal that the trial court erred when it found him eligible for Class X sentencing, because the first predicate offense, which he committed in 2013 at the age of 17, would have been adjudicated in juvenile court at the time of the present offense and should not count as a "conviction" for the purposes of the Class X statute. *People v. Stewart*, 2020 IL App (1st) 180014-U, ¶ 26. The appellate court agreed:

> [Denzal]'s 2013 burglary is not "an offense now *** classified in Illinois as a Class 2 or greater Class felony." Rather, [his] prior 2013 burglary conviction, had it been committed under the laws in effect on August 13, 2016, would have been resolved through delinquency proceedings. ... The offense would have led to a

> juvenile adjudication rather than a felony conviction. As such, [Denzal]'s 2013 conviction is not a qualifying prior offense for Class X sentencing.

Stewart, 2020 IL App (1st) 180014-U, ¶ 32. The appellate court vacated Denzal's Class X sentence and remanded for resentencing as a Class 2 offense. *Id*. ¶ 39.

The State filed a petition for leave to appeal (PLA) on June 24, 2020. This Court allowed the State's PLA on January 27, 2021.

ARGUMENT

I. 720 ILCS 5/5-4.5-95(b) only considers whether the prior offenses would "now" be classified as Class 2 or greater felonies. Denzal's 2013 conviction in adult court for residential burglary from when he was a minor would now be under the exclusive jurisdiction of the juvenile court, and is thus not a qualifying offense. Consistent with the appellate court's decision, remand for a new sentencing hearing as a Class 2 offender, is therefore appropriate.

On November 29, 2017, the trial court sentenced Denzal Stewart as a Class X offender to six years in prison for possession of a stolen motor vehicle (PSMV), a Class 2 felony. (R. 371; C. 103); 730 ILCS 5/5-4.5-95(b)(2017) (§95(b)); 625 ILCS 5/4-103(A)(1)(2017). Denzal's Class X sentence was predicated in part on a 2013 residential burglary, committed when he was 17 years old. (S. C. 44, 46) However, in 2017, Denzal's 2013 residential burglary could not trigger a mandatory Class X term because he was only 17 years old at the time of that offense. Mandatory Class X sentencing applies *only* if the defendant was previously convicted of two offenses "now" classified (2017, on the date of the trial and sentence on the current charge) as Class 1 or Class 2 felonies. §95(b). In 2017, because of recent changes in the Juvenile Court Act (JCA), supported by scientific advances in the understanding of adolescents' brain development, the 2013 offense would be resolved through delinquency proceedings rather than in the criminal court, and thus it is not an offense *now* (at the time of Denzal's 2017 conviction) classified as a Class 2 or greater felony. §95(b); 705 ILCS 405/5-120 (2017); 705 ILCS 405/5-130 (2017).

Consistent with the appellate court decision below, this Court should affirm the appellate court's holding and remand for a new sentencing

hearing, where Denzal will be sentenced as a Class 2 offender. *People v. Stewart*, 2020 IL App (1st) 180014-U, ¶ 32 ("[Denzal]'s 2013 burglary is not 'an offense now *** classified in Illinois as a Class 2 or greater Class felony.' Rather, [Denzal]'s prior 2013 burglary, had it been committed under the laws in effect on August 13, 2016, would have been resolved through delinquency proceedings."), citing *People v. Miles*, 2020 IL App (1st) 180736, ¶ 11 (holding that a defendant's 2006 conviction, had it been committed in 2016, would have been resolved with delinquency proceedings and therefore is not a qualifying offense for Class X sentencing.); *People v. Ruiz*, 2021 IL App (1st) 182553, ¶ ¶ 53-63 (following *Miles* and finding that defendant's 2006 prior robbery conviction from when he was 17 years old is not an offense now classified in Illinois as a Class 2 or greater Class felony, and therefore cannot serve as a predicate offense for Class X sentencing).

Standard of Review

Whether Denzal's conviction in adult criminal court for an offense he committed at age 17 could be a qualifying prior offense for purposes of mandatory Class X sentencing involves a question of statutory construction. As such, it is a question of law subject to *de novo* review. *People v. Baskerville*, 2012 IL 111056, ¶ 18.

Use of Date of Conviction for the 2017 PSMV

Throughout Argument I, Denzal uses 2017, the date he was convicted of the instant PSMV offense, pursuant to *People v. Smith*, 2016 IL 119659, ¶31, in which this Court held that "the plain language of [§95(b)], provides that a defendant must be 21 years old when he is convicted in order to be

eligible for Class X sentencing." In *Smith*, this Court was not asked, nor did it consider, the constitutional ramifications of the plain language of §95(b), which permits a defendant who is **under** 21 years-old on the date of the alleged commission of an offense, and therefore **not** eligible under §95(b), to "age into" a Class X term of years, based on the length of his court proceedings, and other factors beyond his control. The constitutionality of the statute, as applied to Denzal and other similarly-situated defendants, is addressed in Argument II, *infra*.

A. Under the plain language of §95(b), Denzal was not subject to mandatory Class X sentencing. In 2017, Denzal's 2013 residential burglary offense as a 17-year old would not be classified as a Class 2 felony conviction in 2017, because residential burglary by a 17-year old in 2017 was under the exclusive jurisdiction of the Juvenile Court.

This Court has held that when interpreting a statute, the court's "primary objective is to ascertain and give effect to the intent of the legislature." *People v. Molnar*, 222 Ill. 2d 495, 518 (2006); *Baskerville*, 2012 IL 111056, ¶ 18. The language of the statute is the best indicator of intent. *People v. Taylor*, 221 Ill. 2d 157, 162 (2006). A clear and unambiguous statute will be applied without the use of aids of statutory construction. *Molnar*, 222 Ill. 2d at 518-19. Courts should not, under the guise of statutory interpretation, remedy an apparent legislative oversight by rewriting a statute in a way that is inconsistent with its clear and unambiguous language. *Taylor*, 221 Ill. 2d at 162-63. Furthermore, criminal and penal statutes should be "strictly construed in favor of the accused, [with] nothing *** taken by intendment or implication beyond the obvious or literal meaning

of the statute." *Id*. at 162 (internal quotation omitted).

The mandatory Class X sentencing statute in 2017 provided:

> (b) When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense *now* (the date the Class 1 or Class 2 felony was committed) classified in Illinois as a Class 2 or greater Class felony and those charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender. This subsection does not apply unless:
>
> (1) the first felony was committed after February 1, 1978 * * * ;
> (2) the second felony was committed after conviction on the first; and
> (3) the third felony was committed after conviction on the second. ***

§95(b) (2017) (emphasis added).

The plain language of the mandatory Class X statute in effect at the time that Denzal was convicted of PSMV explicitly and unambiguously states that courts must look to how an offense would be classified "now," at the time a defendant is convicted of the present offense. *See Baskerville*, 2012 IL 111056, ¶ 18 (discussing principles of statutory interpretation). For purposes of this argument, "now" in §95(b) means **2017**, when Denzal was convicted of the PSMV. *Smith*, 2016 IL 119659, ¶31. In 2017, when Denzal was convicted (C. 103), residential burglary by a 17-year-old would have been heard in juvenile court, and would have resulted in an adjudication rather than a conviction. (*See* Sec. B., *infra*).

The trial court, in imposing what it believed was a mandatory Class X sentence, did not, however, consider how Denzal's prior 2013 offense would

now be classified. Rather, the court simply found that because Denzal had been convicted of a 2013 residential burglary, in addition to a 2014 PSMV, the sentencing range for the 2017 Class 2 PSMV must be elevated to a Class X sentence range of between six to 30 years instead of the Class 2 sentencing range of three to seven years in prison. 730 ILCS 5/5-4.5-95(b) (2017); 730 ILCS 5/5-4.5-35 (2017). The court did not consider the fact that the 2013 residential burglary occurred when Denzal was 17 years old, which in 2017 would mean that he would be subject to a juvenile adjudication and not a felony conviction in adult criminal court.

Therefore, as the appellate court recognized, under the plain language of the statute, Denzal did not qualify for a mandatory Class X term under §95(b). *Stewart*, 2020 IL App (1st) 180014-U ¶ 32.

B. Under the law in 2017 Denzal's 2013 residential burglary offense would not be classified as a Class 1 or 2 felony conviction but as a juvenile adjudication.

Recent changes to the Juvenile Court Act (JCA) show that Denzal's 2013 offense would now be entirely resolved in juvenile court, and would not be transferred to adult criminal court under any transfer provision, contrary to the State's assertions otherwise. *See* (St. Br. 10-11)

To begin, the residential burglary case would start out in juvenile court. In 2013, the legislature revised the JCA to raise the maximum age for which a teenager would remain under juvenile court jurisdiction for an offense that was not subject to automatic transfer. *See* Pub. Act 98-61 (eff. Jan. 1, 2014); 705 ILCS 405/5-120 (2017). This change from under 17 to under 18 years would have *directly* affected Denzal because he was 17 years

old at the time of his 2013 offense, residential burglary. (S. C. 44, showing Denzal's date of birth as June 1, 1996, and the date that Denzal pled guilty to the offense as November 11, 2013). Thus, the 2013 residential burglary, if committed in 2017 (the date he was convicted on the current offense), would have fallen under the jurisdiction of the Juvenile Court, and not the adult criminal court, as posited by the State. (St. Br. 10-11)

The 2013 residential burglary case would remain in juvenile court and not be transferred under the automatic, presumptive, or discretionary transfer provisions. The 2013 residential burglary offense, under the 2017 JCA scheme, would not qualify as one that would subject Denzal to *automatic transfer* to adult criminal court. (St. Br. 10) On January 2016, another amendment to the JCA went into effect that raised the age of automatic transfer to adult court from 15 years old to 16 years old for first degree murder, aggravated criminal sexual assault, and aggravated battery with a firearm. 705 ILCS 405/5-130; Pub. Act 99-258. The 2016 change provides that: "These charges and all other charges arising out of the same incident shall be prosecuted under the criminal laws of this state." 705 ILCS 405/5-130(1)(a). Denzal's offense, residential burglary, is not included among those offenses. Thus, were the 2013 residential burglary case to have been heard in 2017, it would not have been automatically transferred to adult criminal court. 705 ILCS 405/5-130(1)(a); *see* (St. Br. p. 10, "certain offenses *must* be adjudicated in adult court.") (emphasis in original).

Nor would Denzal be subject to *presumptive transfer* had the residential burglary been committed in 2017, because the 2016 amendments

to the JCA changed the Transfer of Jurisdiction provision. 705 ILCS 405/5-805 (2016). Prior to 2016, any defendant who was at least 15 years old and accused of a wide variety of offenses, including, other than armed violence, any other Class X felony, would be *presumed* to be subject to transfer. 705 ILCS 405/5-805(2)(a) (2015). With the 2016 amendments, the legislature further restricted presumptive transfer to only those 15-years-or-older defendants accused of committing a forcible felony in furtherance of illegal gang activity and who also had a prior adjudication or conviction for a forcible felony. 705 ILCS 405/5-805(2)(a) (2017); Pub. Act 99-258. The record demonstrates that, in 2013, Denzal had no prior adjudications or convictions for forcible felonies, and there is no indication that the residential burglary offense had anything to do with gang activity. (S. C. 45-49, 50 ("denies gang involvement")) Thus, Denzal's 2013 residential burglary offense is not one that would have been subject to presumptive transfer in 2017. *See* (St. Br. p. 10, "other juvenile cases are presumptively transferred to adult court.").

Finally, there is no reason to conclude Denzal would have been subject to *discretionary transfer* under the laws in effect in 2017 for the residential burglary offense. The discretionary transfer provision in effect in 2017 explicitly requires the court to consider a wide variety of factors about the juvenile offender's social history, rehabilitative potential and circumstances of offense. 705 ILCS 405/5-805(3)(b) (2017) (§5-805 transfer). The discretionary transfer statute provides, "In considering these factors, the court shall give greater weight to the seriousness of the alleged offense, the minor's prior record of delinquency than to the other factors listed in this

subsection." 705 ILCS 405/5-805(3)(b). Here, where the State did not present any prior record of delinquency, the issue of discretionary transfer would not have arisen. *See* (St. Br. pp. 10-11, "still other offenses are subject to discretionary transfer to adult court, on the People's motion.").

Moreover, Denzal was the type of adolescent that the 2017 laws are meant to protect from adult criminal court. Denzal's presentence investigation report indicates that his biological father is "unknown." (S. C. 47) Denzal was raised by his mother and step-father, who passed away suddenly in 2011 from a blood clot when Denzal was 14 years old. (S. C. 47) Denzal admitted that he only began getting into trouble when his step-father - "the only father figure he ever had" - passed away. (S. C. 47); *See* Institute of Medicine (US) Committee for the Study of Health Consequences of the Stress of Bereavement; Osterweis M, Solomon F, Green M, editors. Bereavement: Reactions, Consequences, and Care. Washington (DC): National Academies Press (US); 1984. CHAPTER 5, *Bereavement During Childhood and Adolescence*, (citing studies in which "[d]elinquency has been found to correlate with parental bereavement," and that parental loss in boys generates an increased likeliness to "engage in petty theft, car-stealing, fights, drug-taking, or testing authority systems.") Available from: https://www.ncbi.nlm.nih.gov/books/NBK217849/*; see Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (Observing the greater vulnerability to "negative influences and outside pressures" to which young people are subject).

In addition, Denzal admitted that he had substance abuse problems, such as "drink[ing] his problems away." (Sup C. 49) Denzal began smoking

marijuana at age 11, and turned to ecstasy three years later. (Sup. C. 49) He used Xanax and other drugs whenever he could get them, and reported being "high all the time." (Sup. C. 49) In fact, the trial court recognized during the pre-trial proceedings that Denzal's offenses were "fueled by drug addiction." (R. 53) In other words, the trial court understood that such self-medication had negative effects on Denzal's psychological state. "[A]ddiction diminishes the addict's capacity to evaluate and control his or her behaviors." *United States v. Walker*, 252 F. Supp.3d 1269, 1292 (D. Utah 2017). Additionally, "drugs of abuse are characterized as 'hijacking' the neuro-biological mechanisms by which the brain responds to reward ... addiction biologically robs drug users of their judgment, causing them to act impulsively and ignore the future consequences of their actions." *United States v. Hendrickson*, 25 F.Supp.3d 1166, 1172-73 (N.D. Ia. 2014).

Unlike in 2013, courts now more routinely recognize that "a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be evidence of 'irretreivabl[e] deprav[ity],'" and that juveniles thus have "greater prospects for reform." *Miller*, 567 U.S. at 470. Thus scientific advances in the understanding of adolescent brain development, and a corresponding shift in attitude towards what constitutes fair and just proceedings for young offenders, would have made a discretionary transfer of Denzal's 2013 property-based offense inappropriate, especially because he had no prior record of delinquency. Notably, the State does not suggest any basis for such a transfer. (St. Br. 10-11)

This conclusion is furthered supported by statistical data gathered by

the Illinois Juvenile Justice Commission. *See,* Trial and Sentencing of Youth as Adults in the Illinois Justice System: Transfer Data Report (IJJ Report), attached at Appendix.[5] The IJJ Report reflects that statewide, the charges most often discretionarily transferred from juvenile court to adult court via §5-805 motion were first degree murder and armed robbery. *See* IJJ Report, p. 16 (showing 18 §5-805 motion transfers for first degree murder, and 14 §5-805 transfers for armed robbery) In all of Illinois, only *one* juvenile residential burglary case was subject to §5-805 motion transfer to adult court in 2017, in Champaign County. IJJ Report, p. 16, 21. And in Cook County, where Denzal pleaded guilty to residential burglary, the *only* charges that were transferred in 2017 under §5-805 were for armed robbery and first degree murder. IJJ Report, p. 23. In fact, the *only* residential burglary case transferred to adult court in Cook County in 2017 was pursuant to §**5-815**, the habitual offender provision, *see* IJJ Report, p. 23, which Denzal would not have qualified for, as the residential burglary was his first offense. (S. C. 46) The State bears the burden of proving that Denzal would have been transferred to adult criminal court in 2017 on a residential burglary charge, and it failed to do so.

The State's assertion, that Denzal *may* have been discretionarily transferred to adult court pursuant to §5-805 motion, on a residential burglary charge, is not only pure conjecture but belied by the statistical data

[5] IJJ Report available online at http://ijjc.illinois.gov/publications/trial-and-sentencing-youth-adults-illinois-justice-system-2020-transfer-data-report.

gathered by the IJJ Report. This Court should not accept the State's imaginary scenario in lieu of empirical evidence to the contrary.

Further, the State forfeited its contention that the 2013 residential burglary "may" have been resolved in adult court by failing to raise the claim in the appellate court or in its petition for leave to appeal. Supreme Court Rule 315(c)(3) requires that petitions for leave to appeal contain a "statement of the points relied upon for reversal of the judgment of the Appellate Court." *MD Elec. Contractors, Inc. v. Abrams*, 228 Ill.2d 281, 299 (2008) (citing 210 Ill.2d R. 315(c)(3)). "If a party fails to raise an issue in its petition for leave to appeal, it may be deemed a forfeiture of the issue." *Id*. (citing *Central Illinois Light Co. v. Home Ins. Co.*, 213 Ill.2d 141, 152 (2004)). Additionally, under Supreme Court Rules 315 and 341, "a party is required to raise its arguments and provide citation to legal authority in its appellate brief and in its petition for leave to appeal to avoid waiver." *People v. Davis*, 213 Ill.2d 459, 470 (2004). The State failed to raise the argument that Denzal's 2013 residential burglary may have been subject to transfer to criminal court in its appellate court brief or PLA. Accordingly, this claim is forfeited and should not be considered by this Court. *See People v. Williams*, 235 Ill. 2d 286, 299 (2009) (finding claim twice forfeited where party failed to raise it in appellate court or in its PLA.).

Under the law in effect in 2017, a 17-year old accused of residential burglary would not be automatically transferred to criminal court due to the nature of the offense. Nor would a teenager with no prior adjudication for a forcible felony be presumptively transferred. And it would be extremely

unlikely, based on statistical data, that a 17-year old with no juvenile or criminal background charged with a property offense such as residential burglary would be discretionarily transferred. Thus, Denzal's charges in 13CR1512202 would, under the law in effect in 2017, begin in juvenile court and would have been resolved there.

Under the plain language of §95(b), the sentencing court must look to how the predicate offenses would "now" be classified. At the time he was convicted of the PSMV here, a 17 year-old with Denzal's background accused of residential burglary would be subject to juvenile jurisdiction. This means that Denzal's 2013 offense would not "now" result in a felony conviction. *Stewart*, 2020 IL App (1st) 180014-U, ¶ 32; *Miles*, 2020 IL App (1st) 180736, ¶ 22.

C. Section 95(b) does not apply to juvenile adjudications.

Section 5/5-4.5-95(b) looks to whether the defendant has twice been previously convicted of an offense **now classified** as a Class 1 or Class 2 felony. That section does not apply to juvenile adjudications because the language in the statutes governing delinquent minors provides: (1) that an offense that would be considered a felony if committed by an adult is not considered a felony when committed by a minor, and (2) that juvenile adjudications are not considered convictions. Because of this, prior felony convictions in adult court that now would be adjudications in juvenile court may not be used as predicates for mandatory Class X sentencing.

First, as this Court recognized in *Taylor*, it is well established that a juvenile adjudication is not a criminal "conviction." 221 Ill.2d at 166-67, 170

(prosecutions under the JCA are not criminal in nature, rehabilitation is a more important consideration under the Act than under the Criminal Code, and there are important differences between the two); *see also, In re Jonathon C.B.*, 2011 IL 107750, ¶ ¶ 190-97, *modified on denial of rehearing* (amendments to JCA that changed terminology used concerning delinquency proceedings did not render a delinquency adjudication the legal equivalent of a felony conviction.); *In re Rodney H.*, 223 Ill.2d 510, 520 (2006) (proceedings under the JCA are protective and not criminal in nature, and purpose is not to punish); *In re A. G.*, 195 Ill.2d 313, 317 (2001) (proceedings under the JCA are not criminal in nature and are to be administered in a spirit of humane concern for, and to promote welfare of, minor).

Moreover, Your Honors observed that "[i]t is readily apparent that the legislature understands the need for specifically defining a juvenile adjudication as a conviction when that is its intention." *Taylor*, 221 Ill. 2d at 178. Here, §95(b) does not explicitly include juvenile adjudications but requires that prior offenses "now" be classified as Class 1 or Class 2 convictions. Because the 2013 residential burglary would "now" be adjudicated in the juvenile court, it is not a qualifying conviction.

Second, the language of the delinquent minor statutes shows that an offense is classified as a felony only when the defendant was subject to criminal prosecution in an adult court, not when he was subject to juvenile adjudication. For instance, the Extended Jurisdiction statute indicates the State may petition for a criminal proceeding when it "alleges the commission by a minor 13 years of age or older of any offense which *would be* a felony if

committed by an adult." 705 ILCS 405/5-810 (2017) (emphasis added). The implication here is, of course, that the offense is *not* a felony when committed by a juvenile. The Illinois Supreme Court Rules make the same distinction: "These [discovery] rules shall be applied in all criminal cases wherein the accused is charged with a felony, and all juvenile delinquency cases wherein the accused is charged with an offense that *would be a felony* if committed by an adult." Ill. S. Ct. Rule 411 (emphasis added); *see also, e.g.*, 730 ILCS 150/3-5(c), 730 ILCS 5/5-5-3.2(b), and 20 ILCS 2630/5 (2017) (discussing offenses that *would be* felonies if committed by adults but are not when committed by juveniles).

Section 95(b) is part of the Code of Corrections, which contains a section defining the words and terms used therein. See 730 ILCS 5/5-1-1 ("For the purposes of this Chapter, the words and phrases described in this Article have the meanings designated in this Article, except when a particular context clearly requires a different meaning.") The legislature defined the term "conviction" as it is used in the Corrections Act (under which § 95(b) falls), and that definition does not include adjudications of delinquent minors. 730 ILCS 5/5-1-5 (" 'Conviction' " means a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense, rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.") That is, the legislature defined convictions in a way that excludes juvenile adjudications, for purposes of the Code of Corrections. Thus, juvenile adjudications are not qualifying offenses under §95(b). Where the legislature has provided

definitions of any terms within its enactment, such definitions for the purposes of its acts will be upheld. *Mack v. Seaman*, 113 Ill. App. 3d 151, 154 (1st Dist. 1983); *Chicago-Midwest Meat Association v. City of Evanston*, 96 Ill. App. 3d 966, 969 (1st Dist. 1981); accord, *People v. Harman*, 125 Ill. App. 3d 338, 345 (2d Dist. 1984) ("separate acts with separate purposes need not define similar terms in the same way, and the meaning of words within the statute is dependent upon the connection in which the word is used, the object or purpose of the statute and the consequences which probably will result from the proposed construction.")

Section 95(b) is limited by its plain language to criminal "convictions" and does not refer to juvenile adjudications at all. This is in marked contrast to similar statutes in the same Chapter that explicitly state that juvenile adjudications may be considered. *See e.g.*, 730 ILCS 5/5-5-3.2(b)(7) (authorizing consideration of prior adjudication of delinquency for "an act that if committed by an adult would be a Class X or Class 1 felony" as reason for imposing extended term sentence). *See also*, 730 ILCS 150/2(a)(5)(defining "sex offender" to include those adjudicated delinquent of acts that "if committed by an adult" would constitute one of a list of offenses); and 730 ILCS 150/3-5(c)(extending registration requirements to those "adjudicated delinquent for an offense which, if charged as an adult, would be a felony"). Reading §95(b) in context with those statutes, it becomes clear that the legislature excluded juvenile adjudications from being used as qualifying offenses for §95(b).

It is notable that the extended-term sentencing statute, which outlines

factors in aggravation and extended-term sentencing, is the exception that proves the rule. 730 ILCS 5/5-5-3.2. There, the plain language of the statute explicitly provides for the consideration of juvenile adjudications. 730 ILCS 5/5-5-3.2(b)(7) (2017) (discussing offenses that *would be* felonies if committed by adults but are not when committed by juveniles). This statute is under the same Sentencing Chapter as §95(b), Chapter 5 of the Code of Corrections. The explicit *inclusion* of juvenile adjudications in the extended-term statute demonstrates that those adjudications are excluded, unless the legislature provides explicitly otherwise in the statute. Plainly, the legislation knows how to include adjudications when it so desires.

In *People v. Jones*, 2016 IL 119391, this Court looked to the extended-term sentencing statute to determine whether a prior juvenile adjudication was the equivalent of a prior criminal conviction for purposes of extended-term sentencing under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The relevant language appeared in subsection (b)(7), which sets forth various factors to be considered as reasons to impose an extended-term sentence and provides as follows:

> When a defendant who was at least 17 years of age at the time of the commission of the offense is convicted of a felony and *has been previously adjudicated a delinquent minor under the Juvenile Court Act of 1987 for an act that if committed by an adult would be a Class X or Class 1 felony* when the conviction has occurred within 10 years after the previous adjudication, excluding time spent in custody."

730 ILCS 5/5-5-3.2(b)(7) (emphasis added).

The statute at issue in *Jones* explicitly provides for the consideration of prior juvenile adjudications as a basis for imposing an extended-term

sentence, while §95(b) fails to include adjudications of delinquency. *Compare* 730 ILCS 5/5-5-3.2(b)(7), *with* 730 ILCS 5/5-4.5-95(b). This difference is dispositive. "When the legislature decides to authorize certain sentencing enhancement provisions in some cases, while declining to impose similar limits in other provisions within the same sentencing code, it indicates that different results were intended." *People v. Bailey*, 2015 IL App (3d) 130287, ¶ 13, *citing Condell Hospital v. Illinois Health Facilities Planning Board*, 124 Ill.2d 341, 366 (1988) (the mention of one thing implies the exclusion of the other).

Here, the legislature included adjudications of delinquency in certain statutes in the Sentencing Chapter of the Code, 730 ILCS 5, and omitted adjudications from §95(b), within the same chapter. According to this Court's precedent, this omission must be understood as an exclusion. *Id.*

This is not merely an exclusion by implication, either. "Under the doctrine of *in pari materia*, two statutes dealing with the same subject will be considered with reference to one another to give them harmonious effect." *People v. McCarty*, 223 Ill. 2d 109, 133 (2006). Within the same Chapter ("Sentencing"), the legislature explicitly included consideration of prior adjudications of delinquency for extended-term sentencing, 730 ILCS 5/5-5-3.2, showing its awareness of the different terms and ability to use where it specifically desired.

The legislature has explicitly included consideration of juvenile adjudications in other sections of the Corrections Code. In *In re J.W.*, 204 Ill. 2d 50, 64 (2003), this Court considered whether a person adjudicated as a

delinquent minor was required to register for life under the Sex Offender Registration Act ("SORA"). SORA provides that those "convicted" of aggravated criminal sexual assault are required to register. *Id.* at 63-64. This Court interpreted SORA to require those adjudicated delinquent for this offense to register, because the statute explicitly provides that, "[f]or purposes of this Section, 'convicted' shall have the same meaning as 'adjudicated.'" *Id.* at 63 (quoting 730 ILCS 150/2(A-5) (2000)). SORA's express provision that an adjudication be treated as a conviction was the basis for this Court's decision in *In re J.W.*, and strictly distinguishes it from statutes without such language. *Taylor*, 221 Ill. 2d at 178 (discussing *J.W.*). Unlike SORA, §95(b) does not treat adjudications as convictions. Similarly, the Murderer and Violent Offender Against Youth Registration Act (VOYRA) of the Corrections Code, presents another example of the legislature specifically including adjudications with adult convictions. Under VOYRA, the legislature defined "convicted" more broadly: "[f]or purposes of this Section, "convicted" shall have the same meaning as "adjudicated." 730 ILCS 154/5(a)(2). The VOYRA definition thus demonstrates that when the legislature wants to include adjudications in the term "conviction," it knows how to do so and will do so explicitly.

The statutory rule of construction *expressio unius est exclusion alterius* ("the expression of one thing is the exclusion of another") supports this conclusion. This rule of construction "expresses the learning of common experience that when people say one thing they do not mean something else." *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141, 152 (1997) (citation

omitted). When a statute contains a list, the doctrine of *expressio unius est exclusion alterius* gives rise to an inference that "all omissions [from that list] should be understood as exclusions, despite the lack of any negative words of limitation." *In re C.C.*, 2011 IL 111795, ¶ 34 (citing *People v. O'Connell*, 227 Ill. 2d 31, 37 (2007)).

It is true that, 35 years ago and in a different context, this Court stated that "[n]o distinction is drawn between convictions rendered while the defendant was a juvenile and those which occur after the defendant is no longer subject to the authority of the juvenile court." *Fitzsimmons v. Norgle*, 104 Ill. 2d 369, 372-73 (1984); (St. Br. 7). However that case does not apply here for several different reasons.

Initially, it must be stressed that *Fitzsimmons* involved a different statute with very different language. At issue in *Fitzsimmons* was whether the defendant, who, as a minor, had been convicted in adult court of a Class 2 felony, was subject to a provision stating that probation shall not be imposed for a "Class 2 or greater offense if the offender had been convicted of a Class 2 or greater felony within ten years of the date on which he committed the offense for which he is being sentenced." Ill. Rev. St. 38 § 1005-5-3(c)(2)(F) (1981); *Fitzsimmons*, 104 Ill. 2d at 371.

Unlike §95(b), the statute at issue in *Fitzsimmons* had no temporal requirement. By using the term "now," §95(b) explicitly requires that the old offense be evaluated on the basis of the standards in effect at the time of conviction on the new offense. 730 ILCS 5/5-4.5-95(b) ("*** after having twice been convicted *** of an offense that contains the same elements an offense

now (the date the Class 1 or Class 2 felony was committed) classified") (emphasis added). The *Fitzsimmons* statute, on the other hand, had no such timing qualification, and asked only whether the defendant had been convicted of an offense that had ever been classified as Class 2 or greater, without regard to whether that prior offense would still be classified the same way at the time of conviction on the new offense.

Second, there is no indication that the classification of the defendant's prior offense in *Fitzsimmons* would have changed between the time of his prior conviction and the time he was sentenced on his current conviction. That defendant was convicted in adult court as a minor, and the legislature had not changed the applicable criminal statutes so that he would not, at the time of his later conviction, have been subject to the same adult proceedings for the prior offense. By contrast, the legislative statutes applicable to Denzal had changed radically between the 2013 offense and sentencing on the 2017 offense. Accordingly, even if the statute at issue in *Fitzsimmons* had, like the statute here, referred to the state of the laws at the time of the subsequent conviction, the outcome for the *Fitzsimmons* defendant would have been the same.

Moreover, it is essential to stress that the determination in *Fitzsimmons* that juvenile adjudications are "convictions" is in direct contravention to the more recent determination by this Court in *Taylor* that a juvenile adjudication is *not* a criminal conviction. *See, e.g.*, *Taylor*, 221 Ill. 2d at 177; *also, People v. Wallace*, 331 Ill. App. 3d 822, 837 (5th Dist. 2002); *People v. Rankin*, 297 Ill. App. 3d 818, 824 (4th Dist. 1998). Section 95(b) is

limited by its plain language to "convictions." Accordingly, contrary to the State's contention, the language in *Fitzsimmons* is inapplicable to this case.

In a footnote, the State cites two appellate court cases from more than two decades ago that rely on *Fitzsimmons* to hold that juvenile adjudications should be treated no differently than adult criminal convictions under §95(b). (St. Br. 8, fn. 4); *see People v. Bryant*, 278 Ill. App. 3d 578 (1st Dist. 1996); *People v. Banks*, 212 Ill. App. 3d 105 (5th Dist. 1991). Those cases are not applicable here for several reasons.

First, *Bryant* and *Banks* base their conclusions on *Fitzsimmons*, which, as discussed above, construed a different statute than the one at issue here. Unlike §95(b), the statute in *Fitzsimmons* did not explicitly look at the classification of the old offense at the time of the *new* offense. 730 ILCS 5/5-4.5-95(b). Rather, the statute at issue in *Fitzsimmons* asked only whether the defendant had been convicted of a Class 2 or greater felony, without regard to whether that prior would still be so classified, at the time of the new offense.

Second, in *Banks* and *Bryant*, the question before the court was different than that posed here. In those cases, the issue was whether the use of a juvenile adjudication as a qualifying offense under §95(b) constituted an improper double enhancement because the JCA had allowed the defendant to be tried as an adult and then that conviction was used to satisfy the requirement of a prior Class 2 or greater conviction under §95(b). *Banks*, 212 Ill. App. 3d at 107; *Bryant*, 278 Ill. App. 3d at 586. While the *Banks* and *Bryant* courts rejected the argument related to double enhancement, they did not consider the principles of §95(b) set forth here, and thus their holdings

are not relevant to this Court's analysis.

Third, *Banks* and *Bryant* were both decided more than 20 years ago, prior to the increased understanding of juvenile culpability by scientists and the courts. *Roper v. Simmons*, 543 U.S. 551 (2005), the case that began our legal system's recent reevaluation of juvenile culpability, was still about a decade in the future when *Banks* and *Bryant* were decided. Those cases were not decided in today's context, where the legislature and courts have become increasingly uncomfortable with lifelong repercussions for crimes committed as a juvenile.

Finally, like *Fitzsimmons*, *Bryant* and *Banks* predate this Court's decision in *Taylor*. Indeed, all three of the cases were decided many years before the amendments to the JCA which, as discussed above, demonstrate that the legislature intended that adult convictions of juveniles in criminal court should be treated differently than criminal convictions of an adult. *Miles*, 2020 IL App (1st) 180736, ¶ 21 (same); *see also Williams*, 2020 IL App (1st) 190414, ¶ 20 (same); *People v. Martinez*, 2021 IL App (1st) 182553, ¶ 63 (same); *People v. Gray*, 2021 IL App (1st) 191086, ¶ 16 (applying *Miles*, finding that defendant's prior conviction, at age 17, for delivery of a controlled substance was not a valid predicate for armed habitual criminal).

In its brief, the State, for the first time, argues that the appellate court's reliance on *Taylor* is "misplaced." (St. Br. 13) Notably, in the appellate court, the State citing to *Taylor*, agreed that a juvenile adjudication is not a conviction. *See* (App. Ct. St. Br. p. 24: "The People agree that "convicted" as used in [§95(b)] requires a finding of guilt and sentence in criminal court and

not simply an adjudication under the Juvenile Court Act. *See People v. Taylor*, 221 Ill. 2d, 157, 176-78 (2006).") The State, relying on *Taylor*, in its PLA, specifically said a juvenile adjudication "would *not* qualify [Stewart] for Class X sentencing," and that, "a juvenile adjudication is not a "conviction" as defined by section 2-5 of the Criminal Code or section 5-1-5 of the Code of Corrections.") (State PLA, p. 6) (emphasis in original). As such, the State should be estopped from taking a contrary position in this Court. *See People v. Wells*, 182 Ill. 2d 471, 490 (1998) (State estopped from making *laches* argument on appeal where State never asserted doctrine until case reached Supreme Court). In the alternative, the State has forfeited its change of position concerning *Taylor* by failing to raise it in the appellate court or in its PLA. *See People v. Williams*, 235 Ill. 2d 286, 299 (2009) (finding claim twice forfeited where party failed to raise it in appellate court or in petition for leave to appeal.); *see also, People v. Davis*, 213 Ill.2d 459, 470 (2004) (under Supreme Court Rules 315 and 341, "a party is required to raise its arguments and provide citation to legal authority in its appellate brief and in its petition for leave to appeal to avoid waiver.")

D. Because §95(b) looks to the state of the law at the time of the latest sentence, it does not matter that the amendments to the JCA are not retroactive.

The 2016 amendments to the Juvenile Court Act, which raised the age of automatic transfer to the adult criminal courts to age 16, and which limited presumptive transfers to teenagers accused of committing a forcible felony in furtherance of illegal gang activity and who also had a prior adjudication or conviction for a forcible felony, do not apply retroactively to

matters no longer pending in the trial court. *See People ex rel. Alvarez v. Howard*, 2016 IL 120729, ¶¶ 31-35; (St. Br. 9, citing *People v. Richardson,* 2015 IL 118255, ¶ 10). However, because §95(b) looks to the current state of the law, the prospective nature of the revisions to the JCA does not affect it. Section 95(b) looks to whether the defendant has been convicted of an "offense *now classified* as a Class 2 or greater felony," not whether the defendant was convicted of an offense that, at the time of that offense, was classified as a Class 2 or greater felony. Accordingly, the State's citation to *Richardson* is misplaced. (St. Br. 9) Contrary to the State's intimation, whether the amendments to the JCA are prospective has no impact on §95(b). (St. Br. 9-10)

Moreover, in *Richardson*, the sole issue before this Court was whether the saving clause in the exclusive jurisdiction provision of the JCA violated the defendant's equal protection rights because the 17-year-old defendant did not get the benefit of the amendment where he committed the offense before that change. 2015 IL 118255, ¶ 1. At the time of his alleged offenses, the JCA only applied to minors under 17 years of age. *Id*. ¶ 3. The exclusive jurisdiction provision was subsequently amended to apply to minors under the age of 18, but the change only applied prospectively. *Id*. This Court rejected the defendant's equal protection argument and maintained that the amendment did not apply to 17-year-old juveniles who committed offenses prior to the amendment. *Id*. ¶ 10.

Richardson is inapplicable to Denzal's case, because unlike in *Richardson*, the question here does not concern the application of the JCA to

Denzal at the time he committed his 2013 offense; rather, the question is whether the 2013 case qualified as a predicate offense in 2017. Contrary to the State's contention, Denzal is not asking that his 2013 residential burglary be reclassified as a juvenile adjudication, but explaining that it *would be* a juvenile adjudication if committed in 2017, at the time of the PSMV. Even under a prospective application of the JCA that is true. 705 ILCS 405/5-120.

E. *People v. Reed* is an outlier, and its analysis is unsupported.

Every court that has addressed §95(b) has held that the plain language of the statute, with its "focus on the elements of the prior offense," is "clear and unambiguous." *See, e.g., People v. Foreman*, 2019 IL App (3d) 160334, ¶ 46; *People v. Miles*, 2020 IL App (1st) 180736, ¶ 10 (quoting *Foreman*); *People v. Martinez*, 2021 IL App (1st) 182553, ¶ 62 (quoting *Foreman*); *People v. Reed*, 2020 IL App (4th) 180533, ¶ 26 (applying plain language analysis); *People v. O'Neal*, 2021 IL App (4th) 170682, ¶ ¶ 102-103 (applying plain language analysis). The First District has also issued several unpublished decisions, holding that the plain language of §95(b) is clear and unambiguous. *People v. Stewart*, 2020 IL App (1st) 180014-U, ¶ 30; *People v. Newton*, 2021 IL App (1st) 182044-U, ¶ 51 (applying *Miles*); *People v. Suggs*, 2020 IL App (1st) 161632-U, ¶ 43 (applying *Miles*); *People v. Binion*, 2020 IL App (1st) 182538-U, ¶ 38 (same); *People v. Ford*, 2020 IL App (1st) 172835-U,

¶ ¶ 34-35 (same). [6]

Despite this unanimous determination that §95(b) is "clear and unambiguous," the Fourth District of the appellate court came to the opposite conclusion from the First and Third Districts regarding that language. *Compare Stewart*, 2020 IL App (1st) 180014-U (plain language of §95(b) states conviction of juvenile in adult court is not a qualifying offense for §95(b)), with *People v. Reed*, 2020 IL App (4th) 180533 (plain language of §95(b) states juvenile convicted in adult court has a qualifying offense.)

Reed, cited by the State, was wrongly decided. (St. Br. 7) The *Reed* court opined that a juvenile convicted in adult court has a "conviction" for the purposes of §95(b) because nothing in the section suggested that a juvenile convicted in adult court should instead be considered as a juvenile adjudication. *Id.*, ¶ 25. The *Reed* court's reasoning runs afoul of the legislature's definition of "conviction" in the Code of Corrections, where the sentencing code does not include adjudications. 730 ILCS 5/5-1-5. ("'Conviction' means a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense, rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.").

Moreover, the *Reed* court wrongly concluded that §95(b) only requires a sentencing court to look at the elements of the offense, and the elements of burglary remained unchanged between the predicate offense and the present

[6] See Supreme Court Rule 23 (eff. Jan. 2021) (unpublished decisions cited as persuasive authority). Unpublished cases appear in the Appendix.

one. *Reed*, 2020 IL App (4th) 180533, ¶¶ 26-28. Critically, there is only **one** criminal code, and it applies to anyone charged with a violation thereof, adults and minors. Minors are charged with committing violations of the criminal code, either felony violations or misdemeanor violations. Because there is only one criminal code, it necessarily means that a charge against a minor or an adult will have the same "elements;" Illinois has not created a separate listing of "juvenile offenses" but instead relies on the Criminal Code when describing offenses committed by minors. The *Reed* court reasoning seems to contemplate a separate, juvenile Code of Offenses, with separate, and maybe different elements. But there is only one Chapter of Criminal Offenses, Chapter 720, so that every Illinois residential burglary charged against a minor will always "contain the same elements" as an Illinois residential burglary charge against an adult -- the age of the charged person does not alter what the elements are. Section 95(b)'s reference to "elements" pertains to offenses from other jurisdictions. The word "elements," contained in the phrase "contains the same elements as an offense classified in Illinois," describes offenses from foreign, out of state jurisdictions, as demonstrated by the other language in that same sentence: "convicted in any state or federal court."

Further, the *Reed* court made no attempt to discuss the temporal limitation of the language of §95(b), which limits qualifying priors to "an offense *now* . . . classified in Illinois as a Class 2 or greater Class felony." *Id.* (emphasis added). The plain language §95(b) requires consideration of how a past offense would be considered under the laws in effect on the date of the

sentencing for the present offense. The "now" language mandates the following analysis: In 2017, when Denzal was being sentenced on this PSMV, a teenager charged as a first offender with residential burglary (Denzal's first offense) would have his case resolved in juvenile court, and not in adult court. The residential burglary case, thus, would not be a qualifying prior for §95(b).

In contrast to *Reed*, the *Stewart* court integrated the legislature's inclusion of the word "now" in its plain-language analysis of §95(b). *Stewart*, 2020 IL App (1st) 180014-U, ¶ 32 ("[Denzal]'s 2013 burglary is not an offense now *** classified in Illinois as a Class 2 or greater felony.") Thus, the State's reliance on *Reed* is misplaced.

F. The 2021 amendments to §95(b) make explicit that juveniles convicted in adult court were never meant to act as qualifying priors for Class X sentencing.

The State avers that the 2021 amendments to §95(b) "are not retroactive," and thus not applicable to this matter. (St. Br. 13-14) The 2021 amendments explicitly state that prior convictions are not qualifying convictions unless the offense was committed after the defendant turned 21 years of age. 730 ILCS 5/5-4.5-95(b). The amendments became effective on July 1, 2021, after the State filed its brief in this Court; Denzal has not sought retroactive application of those amendments to his case.

Non-retroactivity aside, these amendments make clear the intent of the legislature, apparent in the plain language by the temporal limitation of the "now" employed in the version of §95(b) in place in 2017, when Denzal was sentenced, to exclude convictions of juveniles in adult court from serving as predicate convictions for §95(b). Denzal maintains that the plain language

of §95(b) provides that only prior offenses that would be classified as adult convictions at the time of the trial and sentencing for the most current offense may act as qualifying priors for mandatory Class X sentencing.

Thus, *Reed* and *O'Neal*'s determination that juveniles convicted in adult court have qualifying convictions under §95(b), was contrary to the legislature's intent, as evidenced by the recent 2021 amendments.

To the extent that this is any ambiguity on this point, the amendments serve as an indication of the intent the legislature had all along, that only offenses that would be adult convictions at the time of the current offense may serve as qualifying priors.

Alternatively, if this Court finds the language of §95(b) ambiguous, this Court should apply the rule of lenity. When language within a penal statute is ambiguous, courts resort to rules of statutory construction such as the rule of lenity, which requires that in such situations the penal statute "be strictly construed to afford lenity to the accused." *People v. Brooks*, 158 Ill. 2d 260, 264 (1994); *see also*, *People v. Goldstein*, 204 Ill. App. 3d 1041, 1044 (5th Dist. 1990)("If a statute increasing a penalty or punishment is capable of two constructions, the one which operates in favor of the accused is to be adopted.").

If two different interpretations are possible, which Denzal does not concede – one of which operates in favor of the accused – this Court should adopt the reasoning in *Stewart* as it affords defendants the benefit of the rule of lenity. Therefore, should this Court find ambiguity in §95(b), this Court should apply the rule of lenity and conclude that Denzal's 2013 residential

burglary could not serve as a qualifying offense under §95(b) for Class X sentencing in 2017.

G. Although trial counsel failed to preserve this issue for review by failing to object to the Class X sentence, this Court should review the error under second-prong plain error or ineffective assistance of counsel.

Defense counsel did not preserve this error. (St. Br. 5) The failure to object to an alleged error at trial and raise the issue in a post-trial motion ordinarily results in forfeiture of the issue on appeal. *People v. Thompson*, 238 Ill. 2d 598, 611-12 (2010). However, Supreme Court Rule 615(a) provides that: "any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a). Thus the plain error doctrine permits this Court to review unpreserved sentencing errors in two circumstances: when a "clear or obvious error occurred" and either (1) "the evidence at the sentencing hearing was closely balanced"; or (2) "the error was so egregious as to deny the defendant a fair sentencing hearing." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010); Ill. S. Ct. R. 615(a). Here, the improper imposition of Class X sentencing can be reviewed under the second prong of plain error.

This Court recently reaffirmed that sentencing a defendant contrary to statute affects substantial rights and is, thus, second prong plain error. *People v. Fort*, 2017 IL 118966, ¶ 19. Whenever the trial court relies on an improper factor or misstates the defendant's eligibility for enhanced

sentencing, the error affects substantial rights. *See People v. Lashley*, 2016 IL App (1st) 133401, ¶ 69; *People v. Myrieckes*, 315 Ill. App. 3d 478, 483 (3rd Dist. 2000) (applying second-prong plain error review where the trial court mistakenly found that the defendant was eligible for extended-term sentencing); *People v. Johnson*, 347 Ill. App. 3d 570, 574-76 (1st Dist. 2004) (applying second-prong plain error review where the trial court considered an improper factor at sentencing); *People v. Easley*, 2012 IL App (1st) 110023, ¶¶16, 30 (holding that "sentencing issues are excepted from the doctrine of waiver [*i.e.*, forfeiture] when they affect a defendant's substantial rights," including when a sentence is improperly enhanced to a higher classification) (reversed in part on other grounds by *People v. Easley*, 2014 IL 115581).

Here, the sentencing error was directly related to Denzal's eligibility for Class X sentencing under §95(b). Denzal was only subject to Class X sentencing if his criminal history included two prior offenses that are "now" (in 2017) classified as Class 1 or 2 felony convictions. 730 ILCS 5/5-4.5-95(b) (2017). Where Denzal's criminal history does not support sentencing under §95(b), this Court should find that the statute's improper application affected his substantial rights, and should address this error.

Alternatively, where counsel failed to object to the imposition of Class X sentencing, this Court should find that counsel was ineffective. *People v. Bunning*, 298 Ill. App. 3d 725, 732 (4th Dist. 1998) (finding ineffective assistance for failing to preserve meritorious issues); *People v. Moore*, 307 Ill. App. 3d 107, 114 (5th Dist. 1999). A criminal defendant has the right to the effective assistance of counsel. U.S. Const. amends. VI, XVI; Ill. Const. 1970,

art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984). This includes counsel's performance at sentencing, since sentencing is a critical stage of any criminal proceeding. *People v. Reyes*, 102 Ill. App. 3d 820, 837 (1st. Dist. 1981); *People v. Johnson*, 250 Ill. App. 3d 887, 905 (4th Dist. 1993) (counsel must keep vigorously representing client after a guilty finding).

To succeed on a claim of ineffective assistance of counsel at sentencing, a defendant must show that "counsel's performance fell below minimal professional standards and a reasonable probability exists that the sentence was affected by the poor performance." *People v. Steidl*, 177 Ill. 2d 239, 257 (1997); *People v. Orange*, 168 Ill. 2d 138, 168 (1995). As detailed above, Denzal's criminal history should not have subjected him to mandatory Class X sentencing. (S. C 46); 730 ILCS 5/5-4.5-95(b) (2017). There was no strategic reason for failing to object to its erroneous imposition. Denzal was prejudiced by the improper application of Class X sentencing where his sentencing range jumped from three to seven years in prison, to six to 30 years in prison. Therefore, this Court can review the error as ineffective assistance of counsel.

Conclusion

In 2017, a case involving a 17-year-old charged with residential burglary would not be heard in adult criminal court but in juvenile court, and there, the minor would not be convicted of a felony, but adjudicated delinquent. Section 95(b) requires two offenses that would now qualify as Class 1 or 2 felony convictions; Denzal's prior residential burglary conviction does not now qualify. As such, Denzal was not eligible for mandatory Class X sentencing. Because Denzal should have been sentenced for PSMV as a Class

2, rather than a Class X felony, this Court should affirm the appellate court's decision, and remand to the circuit court with instructions to sentence Denzal anew within the range for a Class 2 felony sentence, with two years of mandatory supervised release, per 730 ILCS 5/5-4.5-35.

II. Basing the applicability of the mandatory Class X statute of Section 5-4.5-95(b) on a defendant's age on the date of the conviction rather than the date of the offense violates the proportionate penalties clause of the Illinois constitution, as applied?, and the *ex post facto*, due process, and equal protection clauses of the Illinois and United States Constitutions. (Cross-relief requested)

Applying Section 5-4.5-95(b) to defendants like Denzal Stewart who were *under 21* at the time of *all* the relevant offenses, renders the mandatory Class X sentencing statute unconstitutional when applied to those defendants. [7] Specifically, §95(b) violates the proportionate penalties clause of the Illinois constitution, as it increases punishment based on an arbitrary factor, the passage of time, over which a defendant has no control, rather than on a defendant's relative culpability. Ill. Const. 1970, art. I, § 11. Further, §95(b) violates the due process and *ex post facto* clauses of the Illinois and United States Constitutions because it changes the applicable sentencing range after the date of the offense and does not provide fair notice at the time of the offense of the specific sentencing range that would apply to a defendant's conduct. U.S. Const., art. I, §§ 9, 10, amend. XIV; Ill. Const. 1970, art. I, §16, §2. The statute also violates the equal protection clauses of both constitutions because it punishes two equally-situated defendants under the age of 21 differently based solely on the date on which they are convicted of their offenses. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2. Here,

[7] Effective July 1, 2021, the legislature has amended Section 95(b), to require all qualifying offenses to have been committed *after* the defendant turned 21 years old. Unless otherwise noted, discussions of Section 95(b) in this argument refer to the version in effect when Denzal was sentenced in November 2017.

Denzal was 20 years old when he was charged with possession of a stolen motor vehicle ("PSMV"). Because proceedings dragged on, Denzal was found guilty by a jury after his 21st birthday, upon which time a greater class of sentence became mandatory. Thus, Denzal "aged into" a Class X sentence.

In *People v. Smith*, this Court held that the plain language of §95(b) meant that defendant's age on the date of conviction would determine whether he was Class X eligible. *Smith*, 2016 IL 119659, ¶ 28, 31.[8] However, the constitutional challenges created by the legislature in permitting a defendant to "age into" a higher class of offense raised in this case were not addressed in *Smith*. 2016 IL 119659. Addressing the constitutional issues now, this Court should find that §95(b) is unconstitutional, vacate Denzal's Class X sentence, and remand the matter for resentencing within the Class 2 range.

A statute is presumed to be constitutional, and "the burden of rebutting that presumption is on the party challenging the validity of the statute to demonstrate clearly a constitutional violation." *People v. Greco*, 204 Ill. 2d 400, 406 (2003) (citations omitted). A criminal statute, such as the one at issue in this case, should be "strictly construed" in favor of the accused and "nothing should be taken by intendment or implication beyond the obvious or literal meaning of [the] statute." *People v. Woodard*, 175 Ill. 2d 435, 444 (1997) (citations omitted). Whether a statute is constitutional is a question of

[8] The *Smith* Court did not decide whether the operative date was being found guilty or sentenced, as the *Smith* defendant was over 21 at both times. *Smith*, 2016 IL 119659, ¶ 13, 31. Denzal was also 21 years-old at the time of his trial and sentence.

law that is reviewed *de novo*. *People v. Malchow*, 193 Ill. 2d 413, 418 (2000). Although the issues raised on cross-appeal were not raised below, the constitutionality of a statute may be challenged for the first time on appeal. *People v. Wagener*, 196 Ill. 2d 269 (2001).

A. Basing a defendant's eligibility for Class X sentencing on his age at the time of the conviction rather than at the time the offense was committed violates the proportionate penalties clause of the Illinois constitution.

Denzal was 20 years old in August 2016, when he was alleged to have committed PSMV. (R. 14, 15) PSMV is a Class 2 offense, carrying a sentencing range of three to seven years in prison. 625 ILCS 5/4-1.3(a)(1); 730 ILCS 5/5-4.5-35(a) (2017). On June 1 of the following year, during the pendency of the pre-trial proceedings, Denzal turned 21 years old. (Supp. C. 4) After he was convicted by a jury, the trial court sentenced him to a mandatory Class X term of six years in prison, to be followed by a three-year term of mandatory supervised release (MSR). (R. 371-72; C. 103); 730 ILCS 5/5-4.5-95(b) (2017) ("when a defendant, over the age of 21 years, is convicted of a Class 1 or 2 felony, [and has two prior qualifying convictions], the defendant shall be sentenced as a Class X offender.") Denzal's culpability for the PSMV offense did not increase with the passage of time, nor did his actions after the offense make him more culpable. Instead, it was his 21st birthday, ten months after the offense, which elevated Denzal from a Class 2 range of years, to a Class X term of years. Passage of time, over which a defendant has no control, is an arbitrary factor that can, as here, result in a more severe punishment. Increasing punishment on an arbitrary factor such

as the passage of time, rather than on culpability, violates the proportionate penalties clause of the Illinois constitution.

The Proportionate Penalties Clause of the Illinois Constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. The Illinois legislature expanded on these general principles in the Code of Corrections, providing that the general legislative purposes underlying all sentencing statutes are fourfold: (1) to impose sanctions that are both "proportionate to the seriousness of the offenses and permit the recognition of differences in rehabilitation possibilities among individual offenders"; (2) to prohibit and prevent crime; (3) to "prevent arbitrary or oppressive treatment" of individuals subject to the Code; and (4) to "restore offenders to useful citizenship." 730 ILCS 5/1-1-2 (West 2017).

The notion that a criminal sentence should reflect an offender's culpability and be proportionate to the offense is grounded squarely in the defendant's actions and state of mind at the time of the offense – not at some future point in time. *See Roper v. Simmons*, 543 U.S. 51, 568-71 (2005) (culpability of youthful offender measured at the time of the offense when evaluating the constitutionality of the juvenile death penalty). In contrast, measuring the applicability of a sentence enhancement at the time of conviction or sentencing creates the opportunity for "arbitrary *** treatment" that the Code of Corrections seeks to prevent. 730 ILCS 5/1-1-2.

To succeed on a proportionate penalties claim, a defendant must

demonstrate that his criminal penalty is "so wholly disproportionate to the offense committed as to shock the moral sense of the community." *People v. Miller*, 202 Ill.2d 328, 339 (2002). This standard has been intentionally left undefined because "as our society evolves, so too do our concepts of elemental decency and fairness. . . ." *Id*. As this Court recognized in *Leon Miller*, "whether a punishment shocks the moral sense of the community is based upon an 'evolving standard of decency that mark[s] the progress of a maturing society.'" *Id.*, quoting, *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Therefore, when considering what is "wholly disproportionate" and what would "shock the moral sense of the community," courts should look to objective evidence but never ignore their "own judgment." *Miller*, 202 Ill.2d at 339-40.

Section 95(b), which measures eligibility for a higher class of offense on a date other than the date of commission, "shocks the moral sense of community" because it permits a defendant who is under 21 years-old on the date of the crime, to "age into" a longer prison term than he was eligible to receive on the date he allegedly committed the offense. That is, his eligibility for a higher class of punishment is governed by the passage of time alone, a factor over which he can exercise no control, rather than on his culpability for the offense or his behavior after its commission. Increasing the penalty based on the passage of time is "wholly disproportionate" to Denzal's conduct as to "shock the moral sense of the community." *Miller*, 202 Ill.2d at 339.

It is a violation of the proportionate penalties clause, where a defendant's sentence may be extended from a Class 1 or 2 range, to a Class X

range of six to 30 years, based on factors unrelated to the defendant's actual conduct. This is so because the length of delay is arbitrary. For example, the length of time between the commission of an offense and a conviction is affected by a wide variety of factors, most of which are controlled solely or partially by the government. The State's Attorney controls the filing of criminal charges against a defendant and generally has up to three years from the date of commission to do so. 720 ILCS 5/3-5(b) (2017). Once that charge is filed, a defendant who is in custody is not entitled to a trial any sooner than 120 days from the date of his arrest, and for a defendant not in custody, that period extends an additional 40 days. 725 ILCS 5/103-5(a),(b) (West 2017). The defendant also lacks control over the docketing power of the trial judge, another government actor. *Pulliam v. Allen*, 466 U.S. 522, 540 (1984) (for purposes of safeguarding a defendant's rights, trial judges are state actors).

In addition to these general delays that are outside every defendant's control, in certain cases the period between the charge, and trial and sentencing, may be further extended by either the State or circumstances beyond the defendant's control. For example, the State may delay the prosecution of a Class X-eligible case by electing to proceed against the defendant on a different pending charge or by satisfying the requirements for a continuance for DNA testing. 725 ILCS 5/103-5(c),(e) (2017).

In some cases, delays between the time of charging and conviction will jeopardize basic constitutional guarantees. For example, a defendant has a constitutional right to be tried while fit (*Pate v. Robinson*, 383 U.S. 375, 386

(1966)), but the price to be paid for the time it takes to regain fitness for some defendants may be a mandatory Class X sentence. At the pre-trial stage, the lack of certainty about how old a defendant will be by the time of trial and sentencing also will interfere with an attorney's ability to render competent legal advice. If the accused is represented by a public defender office with a large backlog of cases, a defendant who is rapidly approaching his 21st birthday may be left to choose between the effective assistance of counsel and the risk of Class X sentencing. *See People v. Bowman*, 138 Ill.2d 131, 143 (1990) (counsel's request for a continuance in order to provide effective representation will toll the speedy trial clock). It may also affect an under-21 year-old defendant's decision to exercise his right to a trial versus to enter a guilty plea.

When the plain language of §95(b) is applied to defendants who were not yet 21 at the time of the offense, it is entirely possible that two identically situated 18- to 20-year-old defendants who were born and arrested on the same day, and who have committed identical crimes, will be subject to two very different sentencing ranges based solely on the timing of their dates of trial and sentencing – based largely on factors outside their own control. The "aging into" scenario, which occurred with Denzal, creates an arbitrary outcome that shocks the moral sense of community, and as such, is an unconstitutional violation of Illinois's proportionate penalties clause. *See e.g., People ex rel. Carroll v. Frye*, 35 Ill.2d 604, 610 (1966)(statute granting prospective pretrial custody credit was invalid as creating an arbitrary discrimination based upon the fortuitous circumstance of conviction date).

The "aging into" impact of §95(b), which arbitrarily penalizes a defendant not for his culpability, but for the passage of time, over which he has no control, violates the proportionate penalties clause and fails to pass constitutional muster. Thus, this Court should vacate Denzal's Class X sentence and remand to the trial court for him to be sentenced anew to a Class 2 term of years.

B. Basing a defendant's eligibility for Class X sentencing on his age at the time of the finding of guilt and sentence rather than the age at the time of the commission of the offense violates constitutional due process protections.

Due process requires that criminal defendants have fair warning of the criminal penalties which will attach to their conduct – a right which is "fundamental to our concept of constitutional liberty." *Marks v. United States*, 430 U.S. 188, 191-92 (1977) (citations omitted); U. S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2. In addition to this requirement of definiteness in criminal sentencing, due process prohibits the arbitrary or unreasonable exercise of the State's police power. *People v. Wilson*, 214 Ill.2d 394, 402 (2005). In order to satisfy due process, a statute must bear a rational relationship to the legitimate public health, safety, or general welfare concerns it was designed to address, and the means by which the statute serves those interests must be reasonable. *Wilson*, 214 Ill.2d at 402. Here, §95(b) violates the due process protections of both the Illinois and U.S. constitutions.

Section 95(b) fails to provide fair notice to defendants under the age of 21 that they could be subject to Class X sentencing, depending upon *when*

they are found guilty and sentenced. At the time an offense is committed, a defendant under the age of 21 will face multiple factors outside his control that will affect his conviction date, including:

- the timing of the prosecutor's charging decision;
- availability of witnesses;
- laboratory backlog;
- the defendant's rights under the speedy trial statute;
- how crowded the court's docket is; and
- the backlog of cases handled by his attorney or public defender.

Providing defendants notice that they may or may not be subject to a mandatory enhanced sentence based on some future event (or events), which may or may not happen, fails to provide the fair warning which is required at the time of the offense. See, *e.g., Fletcher v. Williams*, 179 Ill. 2d 225, 229 (1997) (prohibition against *ex post facto* laws "assures that statutes give fair warning of their effect and permit individuals to rely on their meaning.")

In addition, measuring a defendant's eligibility for Class X sentencing based on his age at the time of conviction and sentencing rather than at time of the offense violates the due process prohibition on arbitrary criminal laws, because there would be no rational relationship between the purpose of §95(b) and its delayed application to a defendant, such as Denzal, who "ages into" a greater sentence. The statutory mitigation of a sentence enhancement based on a defendant's youth reflects a recognition that young defendants are both less culpable and more amenable to rehabilitation than older offenders. See *People v. Mendoza*, 342 Ill. App. 3d 195, 198-99 (2nd Dist. 2003) (in

measuring culpability under Section 5-4.5-95(b), age 21 is a logical place to draw the line given the historic significance of that milestone); *People v. Storms*, 254 Ill. App. 3d 139, 142 (2nd Dist 1993) (provisions of Section 5-4.5-95(b) reflect the presumption that individuals under the age of 21 have greater rehabilitative potential than older defendants); see also, 730 ILCS 5/5-4.5-95(b) (eff. July 1, 2021) (amended to require that "the first offense was committed when the person was 21 years of age or older.")

The notion that a criminal sentence should reflect an offender's culpability and rehabilitative potential is grounded squarely in the defendant's actions and state of mind at the time of the offense – not at some future point in time. See *Roper v. Simmons*, 543 U.S. 551, 568-71 (2005) (culpability of youthful offender measured at the time of the offense when evaluating the constitutionality of the juvenile death penalty). Furthermore, measuring a youthful defendant's eligibility for Class X sentencing at the time of conviction and sentence would arbitrarily penalize defendants for the length of their trial proceedings based on factors outside their control. *People v. Brown*, 2017 IL App (1st) 140508-B, at ¶24. As a result, there is no rational basis for §95(b)'s reliance on a defendant's age at the time of conviction and sentencing. This Court should conclude that §95(b) violates due process when applied to those defendants who are under 21 at the time of the offense.

C. Basing eligibility for Class X sentencing on a defendant's age at the time of the conviction rather than age at time of the offense violates the constitutional prohibition on *ex post facto* laws.

The United States Constitution prohibits both Congress and the

individual states from passing any *ex post facto* law. U.S. Const., art. I, §§ 9, 10. The Illinois Constitution contains a similar *ex post facto* prohibition (Ill. Const. 1970, art. I, §16), which has been read in lockstep with the federal *ex post facto* clause. *Hadley v. Montes*, 379 Ill. App. 3d 405, 409 (4th Dist. 2008). An *ex post facto* law is one that retroactively makes criminal conduct that was not criminal when performed, increases the punishment for crimes already committed, or changes the rules of procedure in force at the time an alleged crime was committed in a way substantially disadvantageous to the accused. *Collins v. Youngblood*, 497 U.S. 37, 42 (1990). The federal *ex post facto* clause has long prohibited statutes both that aggravate a crime to a greater offense than when it was committed and those which provide for a greater punishment than that which was applicable at the time of the offense. *Miller v. Florida*, 482 U.S. 423, 429 (1987), citing *Calder v. Bull*, 3 U.S. 386, 390 (1798). Here, §95(b) violates *ex post facto* because it increases the punishment for a crime after the crime was committed, in instances where the defendant was under 21-years old at the time of the offense.

Two fundamental concerns undergird the *ex post facto* clause: preventing arbitrary or vindictive legislative action, and providing fair notice of the punishment an individual may subject himself to by his actions. *Miller v. Florida*, 482 U.S. at 430. For a sentencing statute to violate the *ex post facto* clause, the law must disadvantage the defendant "by altering the definition of criminal conduct or increasing the punishment for the crime." *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (citations and internal quotation marks omitted). Critically, a violating penal statute must be retroactive

insofar as it "changes the legal consequences of an act completed before its effective date." *Miller v. Florida*, 482 U.S. at 430; *Mathis*, 519 U.S. at 441 (in order to violate *ex post facto*, statute "must apply to events occurring before its enactment").

The retroactive element of the *ex post facto* test is generally triggered when the statute criminalizes or increases the punishment for conduct which occurred prior to the enactment of the statute. *E.g.*, *Miller v. Florida*, 482 U.S. at 430. It is the effect, not the form, of the law that determines whether it is *ex post facto*, with the critical question being "whether the law changes the legal consequences of acts completed before its effective date." *Weaver v. Graham*, 450 U.S. 24, 31 (1981). "'The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised.'" *Weaver*, 450 U.S. at 31 fn. 15, quoting *Cummings v. Missouri*, 71 U.S. 277 (1867).

In the case of §95(b), the date the statute was enacted is not at issue. Instead, the relevant "effective date" is the date a defendant turns 21-years old and the statute becomes automatically applicable to a defendant. This "applicable date" can change after the date of the offense for defendants who have not yet turned 21-years old. Specifically, when defendants like Denzal commit a Class 1 or Class 2 offense while they are under the age of 21, they can not be subject to Class X sentencing under §95(b) at that moment, because they are not yet "over the age of 21 years." However, §95(b) contains

a second, "applicable" date that triggers Class X sentencing if such defendants turn 21 before they are convicted. *Smith,* 2016 IL 119659. It is this second, "applicable" date that increases the punishment for an offense after its occurrence, and therefore violates the prohibition against *ex post facto*.

The shifting effective date in §95(b) violates the principles that are the foundation for the *ex post facto* clause, in that it is both arbitrary and fails to provide fair notice of the applicable punishment at the time of the offense. *Miller v. Florida*, 482 U.S. at 430. As for notice, defendants such as Denzal have no way of knowing when the offense is committed that they will be subject to Class X sentencing at a future date, if the litigation drags on. The "notice" that §95(b) provides to defendants under the age of 21 is thus illusory.

Because the date of conviction will be affected by a wide variety of factors that are largely outside of a defendant's control, *see* Section B, *supra*., the potential for arbitrary application is substantial, and invites the very arbitrariness the *ex post facto* clause is designed to prevent. As a result of the *Smith* Court's interpretation of §95(b), it is entirely possible that two identically-situated defendants under the age of 21 who were born and arrested on the same day, and who have committed identical crimes, will be subject to two very different sentencing ranges based solely on the timing of their dates of conviction. That is, the later-convicted defendant will be punished more severely than his identical, but earlier-convicted counterpart. *People v. Brown*, 2017 IL App (1st) 140508-B, ¶ 37 (noting that "[s]uch

defendants are essentially punished for the passage of time, caused by factors outside their control that are unrelated to either their culpability or capacity for rehabilitation," but affirming Class X sentence based on Illinois Supreme Court precedent.)

"Subtle *ex post facto* violations are no more permissible than overt ones." *Collins v. Youngblood*, 497 U.S. 37, 46 (1990). As the United States Supreme Court observed in *Miller v. Florida*, 482 U.S. at 431, "[t]he constitutional prohibition against *ex post facto* laws cannot be avoided merely by adding to a law notice that it might be changed." The *Miller* Court went on to hold that the revised sentencing guidelines at issue, as applied to petitioner whose crimes occurred before the effective date, violated *ex post facto*. The notice in §95(b), that a defendant might or might not be subject to Class X sentencing based on a future event that may or may not occur, is largely outside the defendant's control and cannot be accurately predicted, fails to pass constitutional muster.

Thus §95(b), which allows a defendant to *age into* a higher class of offense, and a greater punishment, due to a second, internal effective date, violates the *ex post facto* clause. Denzal should have been sentenced for a Class 2, rather than Class X, felony. This Court should remand to the circuit court for resentencing within the range for a Class 2 felony sentence, with two years of mandatory supervised release, per 730 ILCS 5/5-4.5-35. It is well-established that "even if a sentence imposed under a wrong sentencing range fits within a correct sentencing range, the sentence must be vacated due to the trial court's reliance on the wrong sentencing range in imposing

the sentence." *People v. Brooks*, 202 Ill. App. 3d 164, 172 (1st Dist. 1990); *accord People v. Owens*, 377 Ill. App. 3d 302, 305–06 (1st Dist. 2007). Accordingly, even though Denzal's six-year sentence is within the range of a Class 2 felony, due to the court's incorrect application of the mandatory Class X sentencing provision, a remand for resentencing is required.

D. Basing a defendant's eligibility for Class X sentencing on his age at the time of the conviction and sentence rather than at the time of commission of the offense violates the constitutional right to equal protection.

Equal protection guarantees are implicated whenever "the law lays an unequal hand on those who have committed intrinsically the same quality of offense." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Under the equal protection clauses of both the United States and Illinois Constitutions, a statute may not discriminate between two classes of individuals when those classifications are unrelated to the legitimate purpose of the statute. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2; *e.g.*, *People v. Reed*, 148 Ill.2d 1, 7 (1992). While the legislature is relatively free to make distinctions between different classes of persons when enacting laws, "the guarantee of equal protection does *** prohibit the State from according unequal treatment to persons placed by statute into different classes for reasons wholly unrelated to the purpose of the legislation." *Reed*, 148 Ill.2d at 7, citing *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

Because defendants between that ages of 18 and 21 are not members of a protected class for purposes of equal protection analysis, see e.g., *People ex rel. Tucker v. Kotsos*, 68 Ill. 2d 88, 97 (1977) ("[w]hat is "suspect" about a

suspect classification is its long history of use to oppress individuals whose only misfortune is to have been born into the class"), the constitutionality of §95(b) is measured under the rational basis test, which requires that there be "a rational basis for distinguishing the class to which the law applies from that to which it does not." *Reed*, 148 Ill.2d at 8. Under the rational basis test, the classification chosen must bear a rational relationship to a legitimate State goal. *Reed*, 148 Ill.2d at 7-8. Statutory classifications ordinarily will be upheld if "any state of facts may be reasonably conceived to justify" the classification, but "if the power to classify has been exercised arbitrarily, the State cannot justify the legislation simply by labeling it a 'classification.'" *Reed*, 148 Ill.2d at 8. Here, there is no rational relationship between the legislative goal of §95(b) (punishing recidivists more severely) and permitting one to "age into" a mandatory higher class of offense based solely on the passage of time.

In *People v. Smith*, this Court examined §95(b). There, the defendant was convicted of aggravated battery of a corrections officer. 2016 IL 119659, ¶ 1. The *Smith* defendant was 19 years old at the time of the commission of the offense, 20 years old when he was indicted, and 21 years old at the time of trial and sentencing. *Id*. at 13. The question before this Court was whether defendant's age at the time of commission, at the time of the charge, or at time of conviction was the determining factor for Class X sentencing to apply. *Id*. at 8.[9] This Court held that the age at the date that he was found guilty

[9] The *Smith* Court did not address the Equal Protection or other constitutional claims presented here.

and sentenced was the operative date. *Id*. at 31.

As interpreted by this Court in *Smith,* §95(b) takes a class of identically-situated defendants – those under the age of 21 who have committed a Class 1 or 2 offense with two prior qualifying offenses under the statute – and imposes two different sentencing ranges based upon the date on which the defendant is found guilty and sentenced. Under the *Smith* interpretation of the statute, Denzal and another identically-situated 20-year-old defendant – a defendant who was born and arrested on the same day and committed an identical crime – would be subject to two very different sentencing ranges based solely on the timing of their dates of their trials and sentencings. See *People ex rel. Carroll v. Frye*, 35 Ill.2d 604, 610 (1966) (statute granting prospective pretrial custody credit was invalid as creating an arbitrary discrimination based upon the fortuitous circumstance of conviction date). Thus, a trial court may be mandated to impose two different sentencing ranges on identical defendants based on the dates of their convictions and sentences, rather than on their individual culpability.

The legislature's decision to make the Class X sentencing provisions of §95(b) inapplicable to defendants under the age of 21 reflects a recognition that youthful offenders are more amenable to rehabilitation than older defendants. See *Storms*, 254 Ill. App. 3d at 142 (Section 5-4.5-95(b) reflects the presumption that individuals under the age of 21 have greater rehabilitative potential than older defendants); see also, 730 ILCS 5/5-4.5-95(b) (eff. July 1, 2021) (amended to require that "the first offense was committed when the person was 21 years of age or older.")

Here, there is no rational relationship between a legislative intent to attribute lesser culpability and greater rehabilitative potential to younger offenders, but drawing the line between these younger and older offenders at the date of their trials and sentences rather than when the offense was committed. The notion that a criminal sentence should reflect an offender's culpability and rehabilitative potential is grounded squarely in the defendant's actions and state of mind *at the time of the offense*, and to draw that line at some calendar date in the future would arbitrarily penalize defendants for the length of their trial proceedings based on factors outside their control. By "lay[ing] an unequal hand on those who have committed intrinsically the same quality of offense" (*Skinner*, 316 U.S. at 541), §95(b) violates equal protection guarantees so long as its applicability is measured by the defendant's age at the time of trial and sentence rather than at the time of the offense. This Court should find that §95(b) violates equal protection and thus is unconstitutional.

E. This Court may address Denzal's constitutional challenges to §95(b).

While Denzal did not challenge the constitutionality of §95(b) on appeal, this Court may nonetheless address his arguments, for these reasons: constitutional challenges may be raised at any time, presentation of the argument in the lower court would have been futile under this Court's decision in *People v. Smith*, and the record on appeal warrants relief. These will be addressed in turn.

First, as this Court has noted in the past, a challenge to the

constitutionality of a statute may be raised at any time. *In re J.W.*, 204 Ill. 2d 50, 61–62 (2003); *People v. Wright*, 194 Ill.2d 1, 23–24 (2000) (allowing defendant to challenge constitutionality of statute for first time in petition for rehearing); *People v. Bryant*, 128 Ill.2d 448, 454 (1989); see also, *People v. McCarty*, 223 Ill. 2d 109, 122–23 (2006) (permitting proportionate penalties and due process challenges to the constitutionality of a statute, raised for the first time in separate *pro se* and counseled supplemental briefs). Therefore, Denzal has not forfeited his proportionate penalties, due process, *ex post facto*, or equal protection challenges to the constitutionality of §95(b). U.S. Const., art. I, §§ 9, 10, amends. XI, XIV; Ill. Const. 1970, art. I, §§ 2, 16.

Second, this Court determined in *People v. Smith* that defendant's age at the time of trial and sentence was the date for determining mandatory Class X sentencing under Section 95(b). Although the *Smith* Court did not address the constitutional issues presented here, the appellate court lacks authority to overrule decisions of this Court, which are binding on all lower courts. See *Rickey v. Chicago Transit Authority*, 98 Ill.2d 546, 551–52 (1983). Thus, presentation of an argument by Denzal in the appellate court urging that the date of commission of the offense was controlling would have been futile. *See*, *e.g.*, *People v. Artis*, 232 Ill. 2d 156, 164 (2009) (finding that the State did not forfeit an argument seeking the abandonment of the one act, one crime doctrine by not raising it in the appellate court, where that doctrine was established by the Illinois Supreme Court in *People v. King*.)

Third, Supreme Court Rule 318 allows that upon review in this Court from the appellate court, an appellee may seek relief on any issue warranted

by the record on appeal. *People v. Hopkins*, 235 Ill. 2d 453, 467 (2009). Here, the question of whether Denzal qualified for mandatory Class X sentencing under §95(b), based on his age at the time of the offense, was the subject of dispute below, and indeed the trial court held a hearing on that question. (R. 49-50, 60, 75-76, 79-80) Accordingly, the record on appeal demonstrates that relief is warranted, and this Court may review the constitutional challenges.

Conclusion

Application of §95(b) to defendants like Denzal, who were under 21-years old at all relevant times, violates the proportionate penalties clause of the Illinois Constitution, because permitting a defendant who is under 21 years-old at the time of the offense, to "age into" a mandatory higher class of offense, and a greater punishment, based solely on the passage of time, "shocks the moral sense of the community." Ill. Const. 1970, art. I, § 11. Section 95(b) also violates the due process and *ex post facto* clauses of the Illinois and United States Constitutions because it changes the applicable sentencing range after the date of the offense and does not provide fair notice at the time of the offense of the specific sentencing range which will apply to a defendant's conduct. U.S. Const., art. I, §§ 9, 10, amend. XIV; Ill. Const. 1970, art. I, §16, §2. The statute also violates the equal protection clauses of both constitutions because it punishes two equally-situated defendants under the age of 21 differently based solely on the date on which they are tried and sentenced for their offenses. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2. This Court should therefore conclude that §95(b) is unconstitutional as applied to Denzal, vacate Denzal's Class X sentence, and remand the matter

for resentencing within the Class 2 range.

CONCLUSION

For the foregoing reasons, Denzal Stewart, defendant-appellee, respectfully requests that this Court affirm the order of the appellate court vacating Denzal's Class X sentence and remanding to the circuit court for resentencing in the Class 2 range. Alternatively, this Court should find that the application of Section 5-4.5-95(b) to a defendant like Denzal, who was 20 at the time of offense but turned 21 before his conviction and sentence, violates the proportionate penalties clause of the Illinois constitution, and the *ex post facto*, due process and equal protection clauses of the Illinois and United States Constitutions.

Respectfully submitted,

DOUGLAS R. HOFF
Deputy Defender

GINGER LEIGH ODOM
Director of Expungement
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

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, is 69 pages.

/s/Ginger Leigh Odom
GINGER LEIGH ODOM
Director of Expungement

APPENDIX TO THE BRIEF

E-FILED
11/24/2021 9:25 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

2020 IL App (1st) 180014-U

No. 1-18-0014

Order filed April 15, 2020

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DENZAL STEWART, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 16 CR 60199 Honorable Joseph M. Claps, Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's sentence is vacated and the cause remanded for resentencing where the trial court committed plain error by imposing a Class X sentence based on a prior conviction that did not constitute a qualifying offense.

¶ 2 Following a jury trial, defendant Denzal Stewart was found guilty of possession of a stolen motor vehicle (PSMV)(625 ILCS 5/4-103(a)(1)(West 2016)) and based on his criminal history, sentenced as a Class X offender (730 ILCS 5/5-4.5-95(b)(West 2016)) to the statutory minimum of six years' imprisonment with recommendation for boot camp. After pleading

A2

guilty to a charge of escape, defendant was further sentenced to a two-year term of imprisonment, to be served consecutively to his six-year PSMV sentence. On appeal, defendant contends that his criminal history did not qualify him for Class X sentencing. Defendant also contends that defense counsel rendered ineffective assistance by misadvising him of his eligibility for probation and Class X sentencing. For the reasons that follow, we vacate defendant's sentence and remand the cause for resentencing.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by information with one count of PSMV under case no. 16 CR 6019901, and placed on electronic home monitoring pending trial. During proceedings on the PSMV charge, the State charged defendant with escape under case no. 16 CR 1601401. The PSMV case proceeded to jury trial. The relevant facts from the pre-trial proceedings and jury trial are as follows.

¶ 5 A. Pre-Trial Proceedings

¶ 6 On October 28, 2016, defense counsel Debra Gassman informed the court that defendant was "on medication" as part of his drug treatment program in the Cook County Jail. Defense counsel then requested that defendant be evaluated for boot camp, which the trial court granted. On November 2, 2016, the trial court explained to defendant that the State had charged him with escape in case no. 16 CR 1601401 for allegedly violating the conditions of his electronic monitoring on or about September 1, 2016.

¶ 7 On December 8, 2016, defense counsel informed the court that, despite the pending boot camp evaluation, defendant wanted to instead "resolve the matter with probation." Defense counsel stated that she informed defendant that he was not eligible for "any kind of probation" because he had prior Class 1 and Class 2 felony convictions in his background. Defense counsel

further stated that defendant was previously given TASC probation,[1] which he did not complete. The court explained to defendant that he was not eligible for probation and the matter was continued pending boot camp evaluation and screening of defendant's mental health.

¶ 8 On February 2, 2017, defense counsel Michael Biel entered his appearance. The State tendered a plea offer, and held it open until the following court date. On February 27, 2017, the State informed the court that it "extended an offer earlier on a less than a Class X, and [defendant] refused it, or he rejected" it. Prior to setting the case for trial, defense counsel informed the court that defendant was "asking for a TASC evaluation" and also "asking to be evaluated for the possibility of being transferred to drug court." Accordingly, defense counsel requested "a 30 day date to see if he qualifies for either one of those." Defense counsel also acknowledged that defendant was evaluated for "Mental Health Probation," but did not qualify.

¶ 9 On the next court date, defense counsel reported that defendant was evaluated for TASC probation and was found acceptable. The State responded that defendant was ineligible for TASC probation because he had previously received TASC that was terminated unsatisfactorily. Defense counsel agreed that a defendant may only get TASC once and had communicated this to the defendant. Additionally, defense counsel noted that as charged, defendant did not qualify for Adult Re-Deploy, drug court, or mental health probation. Later in the proceeding, defense counsel stated:

> "I would want to make a clear record in this case. When my client was arrested and charged with the possession of stolen vehicle, he was 20 years old. Because he was only

[1] TASC probation, also known as "Treatment Alternatives for Criminal Justice Clients" probation is governed by Article 40 of the Alcoholism and Other Drug Abuse and Dependency Act, which provides that an individual with a substance use disorder "may elect treatment under the supervision of a [designated] program." 20 ILCS 301/40-5 *et seq.* (West 2016).

> 20 years old, Judge, he is not X mandatory. On June first of this year, he turns 21 years old. As a result of that birthday, he will then be X mandatory by law, by statute. I did let my client know that. I just wanted to make that record.
>
> Judge, my client is asking for [a] 402 conference. The State has offered the minimum."

¶ 10 The court explained the 402 conference to defendant as well as the court's role and participation in the conference. Defendant agreed to the court's participation and the court proceeded to conduct a 402 conference. The State offered the minimum sentence on both charges: three years for the PSMV charge and two years for the escape charge, to be served consecutively. The court agreed with the State's recommendation and continued the matter to April 17, 2017 for defendant to consider the offer. Before adjourning, the court noted for the record that "defendant was advised that his birthday will change the sentencing mandatory minimum significantly which is in June."

¶ 11 On April 17, 2017, defense counsel was not present in court. Defendant asked for and was granted a continuance until May 3, 2017 to speak with his counsel regarding the State's 402 offer. On May 3, 2017, defense counsel informed the court that defendant rejected the 402 offer. Defense counsel also stated:

> "If I can just also put on the record that when we did the 402, I stated that it was my belief that based on the law, as of June 1st, when he turned 21 years of age, he would then be X mandatory, Judge, I do not believe that is the case. I believe that the X mandatory — the age of when someone is X mandatory is when they are — when the crime is charged. So that's my position with that.
>
> But, nevertheless, Judge, he is rejecting the offer. He has indicated to me that there is [*sic*] a couple of witnesses he would like me to interview."

¶ 12 The matter was then continued until June 6, 2017 for a final status date. On June 6, 2017, defense counsel requested a Behavioral Clinic Exam (BCX) because defendant "indicated he spent some time in some mental health institutions." The court agreed and the matter was continued. On July 7, 2017, the parties informed the court that they had received a "psychologist's report that said that [defendant] wouldn't cooperate but ***is fit for trial." The court instructed defendant to cooperate with the doctors and continued the matter until August 7, 2017. On that date, the court noted that the report came back indicating that defendant was fit for trial. Defense counsel requested the court "re-open" the 402 conference to consider sentencing defendant to TASC probation. Defense counsel acknowledged that defendant had received TASC probation once before, but argued that he was nevertheless eligible because the prior TASC was terminated unsatisfactorily and the charge was not vacated. In response, the court noted that defendant was ineligible for TASC probation because he had been convicted of residential burglary and had the pending escape charge.

¶ 13 The State then argued that defendant was Class X mandatory because he was no longer 20 years old, which meant that the original plea offer of three years' imprisonment on the PSMV followed by two years' imprisonment on the escape charge was invalid, and that the offer would have to be at least six years and two years. Defense counsel disagreed, arguing that the defendant's age at the time of the offense triggered the statute, meaning that defendant would "never be Class X mandatory" because he was only 20 years old when the offense was allegedly committed. The court asked the parties to tender cases in support of their respective interpretations of the statute. The matter was continued until August 9, 2017.

¶ 14 On August 9, 2017, defense counsel argued that, pursuant to *People v. Brown*, 2015 IL App (1st) 140508, defendant was ineligible for a Class X sentence because he was under the

age of 21 at the time the offense was committed. In response, the State contended that in *People v. Smith*, 2016 IL 119659, our supreme court overruled *Brown* and held that it is the defendant's age at the time of conviction which controls under the Class X sentencing statute. The court agreed with the State that the defendant's age at the time of conviction is the deciding factor in determining whether defendant was Class X mandatory. In response, defense counsel noted that prior to the *Smith* decision in March 2017, the date of the offense or charge was the determining factor. However, defense counsel agreed that because defendant had turned 21 years old, he was Class X mandatory. Defense counsel stated that this was explained to defendant prior to the 402 conference. The court noted that the prior offer of consecutive sentences of three years and two years was no longer valid given defendant's age, and that the minimum sentences were now six years and two years. The court then asked whether defense counsel had explored with the State the possibility of a plea for six years on the PSMV charge, and a *nolle* on the escape charge. The State responded that it did not discuss any offers and defense counsel stated that "Mr. Stewart has never at any point in time expressed any interest in pleading guilty." The matter was continued for jury trial.

¶ 15 B. Jury Trial

¶ 16 At the jury trial, Franklin Tyler testified that he owned a 1997 Chrysler Sebring convertible in good condition. On August 11, 2016, he parked the Sebring in the driveaway of his house on the South Side of Chicago. The following morning, the car was missing. Tyler still had the car keys and did not give anyone permission to take his car. He reported the car stolen and the police located the car a few days later. When Tyler went to retrieve his car, he noticed wires hanging down from the car's steering column. Tyler also testified that he did not know defendant.

¶ 17 Chicago police officer Ronald Cavanaugh testified that on August 13, 2016, at approximately 8:45 p.m, he was on patrol with his partner Officer Ramirez near 11103 South Michigan Avenue in Chicago, Illinois. They observed a 1997 Chrysler Sebring parked in a no-parking zone, which they discovered to be stolen upon running the plates through an on-board system. The Sebring started to drive northbound on Michigan Avenue and the officers followed for a few blocks until the vehicle came to a stop near 10924 South Wabash Avenue. Cavanaugh then received confirmation via radio that the car was stolen. The officers pulled behind the Sebring, activated their emergency lights, and approached the driver's side on foot. Cavanaugh observed defendant sitting in the driver's seat and saw no one else inside the vehicle. He also observed that a "plastic fortification" behind the steering wheel was cracked and damaged with wires hanging out of the column.

¶ 18 Defendant was ordered out of the vehicle and handcuffed. Cavanaugh testified that defendant "freely admitted" or stated that, "This is my uncle's car. It was stolen earlier. And I just got it back." Cavanaugh returned to the Sebring and drove it to the police station. Cavanaugh saw the ignition had been destroyed and that a flat head screwdriver was on the seat which, based on his experience, was used to start the vehicle. There were no keys in the vehicle and the brakes did not fully engage. After he drove the Sebring to the police station, Cavanaugh notified Tyler who then came to the police station.

¶ 19 On cross-examination, Cavanaugh testified that he nor his partner asked defendant to give a signed statement. There was no video or tape recording of the statement, only what Cavanaugh had stated in his police report.

¶ 20 The defense then moved for a directed verdict, which the court denied. Defendant elected not to testify.

AB

¶ 21 The jury found defendant guilty of PSMV. The State presented information at sentencing that defendant was convicted of residential burglary in 2013 when he was 17 years old and of PSMV in 2014 when he was 18 years old. The trial court found that defendant was subject to mandatory sentencing as a Class X offender based on his prior convictions for residential burglary and PSMV. Accordingly, the court sentenced defendant to the statutory minimum term of six years in the Illinois Department of Corrections, noting that "except for the change in the law" defendant could have received less than a six-year term due to his age at the time of the offense. The court also recommended boot camp but noted that it was unlikely the camp would accept him as he was on psychotropic medication and had a pending escape charge. The court also ordered a three-year term of MSR, and 433 days credit for time served. Defendant then pled guilty to the additional charge of escape in exchange for a minimum two-year sentence, to be served consecutively to the PSMV sentence.

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 On appeal, defendant contends that the trial court improperly sentenced him as a Class X offender based on an ineligible prior felony conviction. Defendant further argues that his counsel rendered ineffective assistance by misadvising him regarding his eligibility for probation and whether he would be subject to the mandatory Class X sentencing on the PSMV charge after he turned 21 years old.

¶ 25 A. Class X Sentencing

¶ 26 Defendant concedes that his 2014 PSMV conviction is a qualifying prior offense under the statute, however, he argues that his 2013 burglary conviction is not a qualifying offense as it was entered when he was 17 years old. Defendant contends that due to subsequent amendments

to the Juvenile Court Act raising the age for exclusive juvenile court jurisdiction to 17 years (see Pub. Act 98-61 (eff. Jan. 1, 2014) (amending 705 ILCS 405/5-120)), his 2013 burglary conviction is not "an offense classified [on August 13, 2016] in Illinois as a Class 2 or greater Class felony." Rather, it is an offense that on August 13, 2016, would have been resolved with delinquency proceedings in juvenile court. As such, defendant argues that his Class X sentence was improper based on the plain language of subsection 95(b) of the Unified Code of Corrections (Code) (730 ILCS 5/5-4.5-95(b) (West 2016)). Defendant further contends that even if this court were to find subsection 95(b) of the Code to be ambiguous, the legislative history, the emerging brain science regarding criminal conduct of juveniles, and the rule of lenity warrants a finding that defendant is not subject to Class X sentencing based on a prior conviction at the age of 17.

¶ 27 As an initial matter, defendant acknowledges that he has waived this issue by not objecting to it in the trial court, but maintains that we may review the issue under the second prong of the plain error doctrine. Generally, sentencing issues are forfeited for review unless the defendant both objects to the error at the sentencing hearing and raises the objection in a post-sentencing motion. *People v. Powell*, 2012 IL App (1st) 102363, ¶ 7. Nevertheless, forfeited sentencing issues may be reviewed for plain error where (1) the evidence was closely balanced; or (2) the error was so egregious that the defendant was deprived of a substantial right and thus a fair trial. *People v. Herron,* 215 Ill.2d 167, 178–79 (2005). The first step in a plain error analysis is to determine whether any error occurred. *People v. Lewis,* 234 Ill.2d 32, 43 (2009). This is because "'without error, there can be no plain error.'" *People v. Wooden*, 2014 IL App (1st) 130907, ¶ 10. As such, our inquiry turns to whether the trial court erred in finding

defendant's 2013 burglary conviction to be a qualifying prior offense under the Class X sentencing statute.

¶ 28 The interpretation of a statute involves a question of law which we review *de novo*. *People v. Simpson*, 2015 IL 116512, ¶ 29. The fundamental rule of statutory interpretation is to ascertain and give effect to the legislature's intent. *Id.* The most reliable indicator of the legislature's intent is the statutory language, given its plain and ordinary meaning. *Id.* In determining the plain and ordinary meaning, a court must analyze a statute in its entirety, construing words and phrases in light of other relevant provisions rather than in isolation. *People v. Smith*, 2016 IL 119659, ¶ 27. Each word, clause and sentence of a statute must be given reasonable meaning and should not be rendered superfluous. *Id.* We will not depart from the plain language by reading in limitations, exceptions, or conditions which the legislature did not express. *Id.* When the language of the statute is clear and unambiguous, it must be applied as written, without resorting to extrinsic aids of statutory construction. *Id.*

¶ 29 Here, the statute at issue is subsection 95(b) of the Code, which provides in relevant part as follows:

> "(b) When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, except for an offense listed in subsection (c) of this Section, after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now (the date the Class 1 or Class 2 felony was committed) classified in Illinois as a Class 2 or greater Class felony, except for an offenses listed in subsection (c) of this Section, and those charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender." 730 ILCS 5/5-4.5-95(b) (West 2016).

¶ 30 In *People v. Foreman*, this court found the language of subsection 95(b) of the Code to be "clear and unambiguous." 2019 IL App (3d) 160334, ¶ 46. We emphasized that under subsection 95(b), "a trial court must sentence a defendant as a Class X offender if the defendant has prior qualifying felony convictions that satisfy the requirements of the statute." *Id.* ¶ 44. The court noted that the "focus is on the elements of the prior offense" as the plain language of the statute provides that an offense is a qualifying offense if it "contain[s] the same elements as an offense now classified in Illinois as a Class 2 or greater Class felony." *Id.* ¶ 46. The statutory language is also clear that the relevant question is whether the prior offense would have been a Class 2 or greater felony if committed on the date of the present offense. Because the statute is unambiguous in this regard, we need not consider its legislative history, resort to other extrinsic aids of statutory construction, or rely on the rule of lenity. See *People v. Miles*, 2020 IL App (1st) 180736, ¶ 10 (holding that the legislative history need not be considered as the Class X statute is unambiguous); see also *People v. Fiveash*, 2015 IL 117669, ¶ 34 (stating that "the rule of lenity applies only to statutes containing 'grievous ambiguities'").

¶ 31 Having found that the statute is unambiguous, we must now determine whether defendant's 2013 burglary conviction constitutes a qualifying prior offense. We find that it does not. The State contends that it is irrelevant that a 17-year-old who commits residential burglary would now be subject to delinquency proceedings pursuant to an amendment to section 5-120 of the Juvenile Court Act. According to the State, the "amendment to section 5-120 of the Juvenile Court Act, raising the age to 18 years for 'jurisdiction' over felony offenses only applie[s] prospectively." Essentially, the State is arguing that the amendment applies only to violations committed on or after the effective date of January 1, 2014 and not to a 2013 conviction.

¶ 32 Although we are mindful of the effective date of the Act, we also note that for purposes of Class X sentencing, defendant's 2013 burglary is not "an offense now *** classified in Illinois as a Class 2 or greater Class felony." Rather, defendant's prior 2013 burglary conviction, had it been committed under the laws in effect on August 13, 2016, would have been resolved through delinquency proceedings. See *People v. Miles,* 2020 IL App (1st) 180736, ¶ 11 (holding that a defendant's 2006 conviction, had it been committed in 2016, would have been resolved with delinquency proceedings and therefore, is not a qualifying offense for Class X sentencing). The offense would have led to a juvenile adjudication rather than a felony conviction. As such, defendant's 2013 conviction is not a qualifying prior offense for Class X sentencing.

¶ 33 In arguing against this conclusion, the State asserts that even if defendant's 2013 conviction would have been adjudicated by juvenile court, his conviction could still be used to sentence him as a Class X offender. The State relies on *People v. Jones*, 2016 IL 119391, *Fitzsimmons v. Norgle*, 104 Ill. 2d 369 (1984), *People v. Banks*, 212 Ill. App. 3d 105 (1991), and *People v. Bryant*, 278 Ill. App. 3d 578 (1996) for the proposition that juvenile adjudications can also be used as convictions under subsection 95(b). However, the State's reliance on these cases is misplaced. None of these cases stand for the proposition that a juvenile adjudication is tantamount to a "conviction."

¶ 34 *Jones* involved a different issue than one presented here. In *Jones*, the statute at issue specifically authorized the use of prior juvenile adjudications in imposing an extended-term sentence (730 ILCS 5/5-5-3.2(b)(7) (West 2016)), whereas the statute here is simply limited by its plain language to prior "convictions" and is silent regarding the use of delinquency adjudications (730 ILCS 5/5-4.5-95(b) (West 2016). "When the legislature decides to authorize

certain sentencing enhancement provisions in some cases, while declining to impose similar limits in other provisions within the same sentencing code, it indicates that different results were intended." *People v. Bailey*, 2015 IL App (3d) 130287, ¶ 13.

¶ 35 The State's reliance on *Fitzsimmons, Banks*, and *Bryant* is also misplaced. Citing to *Fitzsimmons*, the State argues that "no distinction is drawn between convictions rendered while the defendant was a juvenile and those which occur after the defendant is no longer subject to the authority of the juvenile court." *Fitzsimmons*, 104 Ill. 2d at 372-73. The statute at issue in *Fitzsimmons* was section 5-5-3(c)(2)(F) of the Code, which precludes a defendant from receiving probation if he is convicted of a Class 2 felony or greater within 10 years of a prior conviction. *Fitzsimmons*, 104 Ill.2d at 373. There, our supreme court addressed whether a prior conviction required to trigger section 5-5-3(c)(2)(F) encompasses a conviction under the criminal code when an offender was a juvenile. *Id.* at 372. The court found that "conviction" was defined in the same manner under both the Code and the Criminal Code of 1961. *Id.* Thus, our supreme court held that there was no distinction between convictions rendered while defendant was a minor and convictions which occur after the defendant is no longer subject to juvenile court's authority. *Id.*

¶ 36 The *Fitzsimmons* court's holding, however, no longer applies in light of our supreme court's decision in *People v. Taylor*, 221 Ill. 2d 157 (2006). In *Taylor*, our supreme court distinguished the constitutional issue of using juvenile adjudications for enhancement purposes under *Apprendi* from the issue of whether juvenile adjudications constitute "convictions" under the Criminal Code of 1961. The supreme court observed that in the absence of a statute expressly defining a juvenile adjudication as a conviction, Illinois courts have consistently held that juvenile adjudications do not constitute convictions. *Id.* at 176. The supreme court noted

that "[i]t is readily apparent that the legislature understands the need for specifically defining a juvenile adjudication as a conviction when that is its intention" and because the legislature had not done so in the statutory sections at issue in that case, it was "constrained to find that [the legislature] had no intent to do so." *Id.* at 178. Similarly, here, where the statute does not provide that a prior conviction includes juvenile adjudications, we are constrained to find otherwise.

¶ 37 Next, citing to *Banks* and *Bryant*, the State argues that "when construing the Habitual Criminal Act (the HCA), this Court has repeatedly held that any prior [conviction] may be used as a predicate under the statute" and that "no exception is made for convictions obtained while defendant was a juvenile.'"[2] We find the State's argument unavailing.

¶ 38 Both *Banks* and *Bryant* are distinguishable from the present case. There, the courts were presented with arguments focusing solely on the defendants' status as minors at the time they committed their prior offenses. *Banks*, 212 Ill. App. 3d at 107; *Bryant*, 278 Ill. App. 3d at 586. Additionally, the decisions in both cases rested on the *Banks* court's finding that nothing in the Juvenile Court Act or the Criminal Code of 1961 indicated that criminal convictions of minors should be treated differently than criminal convictions of an adult. *Id.* Here, defendant's argument does not rest solely on his age but rather on the amendment to section 5-130 of the Juvenile Court Act, which had the effect of vesting the juvenile court with exclusive jurisdiction over minors. Given that *Banks* and *Bryant* predate this amendment, we find that *Banks* and *Bryant* do not inform our decision.

[2] Both *Banks* and *Bryant* involved the Habitual Criminal Statute which is now subsection 95(a) of the Code. See 730 ILCS 5/5-4.5-95(a) (West 2016) (formerly 720 ILCS 5/33B-1).

A15

¶ 39 Having found error occurred, we may provide defendant relief under the second prong of the plain-error doctrine since the unauthorized Class X sentence affected defendant's substantial rights. See *People v. Fort*, 2017 IL 118966, ¶ 19 ("[T]he imposition of an unauthorized sentence affects substantial rights and, thus, may be considered by a reviewing court even if not properly preserved in the trial court.") Accordingly, we vacate defendant's Class X sentence and remand to the circuit court for resentencing as a Class 2 offender.

¶ 40 B. Ineffective Assistance of Counsel

¶ 41 Although we have found that defendant's sentence should be vacated, it is still necessary to address defendant's claim of ineffective assistance of counsel because this claim cannot be remedied by a new sentencing hearing. Defendant contends that he was denied effective assistance of counsel because counsel "affirmatively misadvised him that he was eligible for probation, and wrongly told him that he was not subject to mandatory Class X sentencing on the PSMV charge after he turned 21." As such, defendant requests this court to not only vacate his conviction and remand for resentencing but to remand his case for "specific performance of the initial plea [offer] of three years on the PSMV charge, followed by two years on the escape charge."

¶ 42 Both the United States and Illinois constitutions guarantee criminal defendants the right to the effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. In *People v. Curry*, 178 Ill. 2d 509, 528 (1997), our supreme court recognized a sixth amendment right to effective assistance of counsel during plea negotiations, holding that a "criminal defendant has the constitutional right to be *reasonably* informed with respect to the direct consequences of accepting or rejecting a plea offer." (Emphasis in original.) This right "extends to the decision to reject a plea offer, even if the defendant subsequently receives a

fair trial." *Id.* at 518. However, even where a defendant is misinformed by his attorney during plea negotiations, no relief is available unless the defendant can establish the requisite prejudice. *People v. Hale*, 2013 IL 113140, ¶ 18.

¶ 43 We review ineffective assistance of counsel claims under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 688 (1984). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000). To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) counsel's performance was objectively unreasonable under prevailing professional norms; and (2) there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id. at* 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Hale*, 2013 IL 113140, ¶ 18. In other words, the "defendant must establish that there is a reasonable probability that, absent his attorney's deficient advice, he would have accepted the plea offer." *Id.* To show prejudice in the plea bargaining context where the defendant claims he rejected an offer due to counsel's deficient performance, "a defendant must show that he would have accepted the plea offer but for counsel's erroneous advice, that the State would not have rescinded the offer, and that the trial court would have accepted it." *People v. Brown*, 2015 IL App (1st) 122940, ¶ 66 (citing *Hale*, 2013 IL 113140, ¶ 19). This showing of prejudice must "encompass more than a defendant's own 'subjective, self-serving' testimony" and instead there must be "independent, objective confirmation that defendant's rejection of the proffered plea was based upon counsel's erroneous advice, and not on other considerations." *Hale*, 2013 IL 113140, ¶ 18.

¶ 44 Here, defendant clearly cannot meet his burden under the prejudice prong. See *Hale*, 2013 IL 113140, ¶ 17 (providing that the court may dispose of an ineffective assistance of counsel claim by proceeding directly to the prejudice prong without addressing counsel's performance). First, defendant argues that counsel "affirmatively misadvised him that he was not Class X mandatory, based on an interpretation of the recidivist statute that the Illinois Supreme Court had rejected months before." Defendant contends that this erroneous advice led him to reject the State's initial offer of three years on the PSMV charge and subjected him to a longer Class X sentence which he would not have faced had counsel advised him correctly.

¶ 45 Defendant does not point to any statements by defense counsel indicating that he advised defendant to reject the initial offer and instead points to counsel's reliance on *Brown,* 2015 IL App (1st) 140508. Defendant contends that counsel's reliance on *Brown*, a case overruled by our supreme court, supports his argument that defense counsel was misinformed of the law and incorrectly advised him that he would never be subject to Class X sentencing as he was under the age of 21 years at the time the offense was committed. However, the record is clear that even prior to defense counsel's reliance on *Brown*, defendant was correctly admonished by both counsel and the trial court that a Class X sentence requires the offender to be 21 years old at the time of conviction. Specifically, on March 29, 2017, defense counsel stated for the record that when defendant was arrested and was charged with the possession of a stolen vehicle, he was 20 years old and not subject to Class X mandatory. However, counsel also noted on record that defendant would turn 21 years old on June 1st of that year which would subject him to sentencing under Class X. Defense counsel stated that this was communicated to defendant. Additionally, during the 402 conference that same day with defendant present, the trial court noted that "defendant has been advised that his birthday will change the sentencing mandatory

minimum significantly which is in June." Despite being correctly admonished in this regard, defendant rejected the State's initial plea offer and defense counsel stated that defendant had not shown any interest in pleading guilty. Any subsequent misinterpretation of the statute by counsel did not prejudice defendant. As such, defendant cannot show that he would have accepted the plea offer but for his counsel's erroneous advice.

¶ 46 Next, defendant argues that defense counsel was ineffective because he pursued an evaluation for boot camp and TASC probation for over a year despite his ineligibility due to his background and mental health issues. Defendant contends that in the course of that one year, he turned 21 years old which subjected him to sentencing under the Class X statute. Defendant's argument is unavailing. The record shows defendant had initially urged counsel to pursue alternatives to sentencing even after being admonished that his twenty-first birthday would raise the minimum available sentence. For instance, the record shows that on February 27, 2017, defense counsel acknowledged defendant's ineligibility for mental health probation but sought TASC evaluation and evaluation for drug court upon defendant's request. In any event, this argument is rendered moot by our conclusion that defendant never became eligible for a Class X sentence.

¶ 47 III. CONCLUSION

¶ 48 For the reasons stated, we vacate defendant's Class X sentence and remand to the circuit court for resentencing as a Class 2 offender.

¶ 49 Sentence vacated; remanded.

A19

2021 IL App (1st) 182044-U

No. 1-18-2044

Order filed June 30, 2021

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 17 CR 13158
	)	
DION NEWTON,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ODEN JOHNSON delivered the judgment of the court.
Presiding Justice Mikva concurred with the judgment.
Justice Harris dissented.

ORDER

¶ 1 *Held*: We vacate defendant's conviction and remand for a new trial, where the trial court erred in not permitting the jury instruction for the lesser included offense, criminal trespass to a vehicle, when there was some evidence presented at trial, that if believed by a jury, could have resulted in a conviction of that offense. We find defendant was improperly sentenced as a Class X offender based on the plain language of the statute pursuant to section 5-4.5-95(b) (730 ILCS 5/5-4.5-95(b) (West 2018)) of the Unified Code of Corrections. We find the prosecutor's statements in closing argument to be improper, however, there is no plain error where defendant cannot show the requisite prejudice.

¶ 2 Following a jury trial, defendant Dion Newton was found guilty of possession of a stolen vehicle and was sentenced to eight years' imprisonment. On appeal, defendant contends that: (1) the trial court erred in denying his request to submit a jury instruction for the lesser included offense of criminal trespass to a vehicle; (2) defendant should not have been sentenced as a Class X offender, and (3) the State's closing argument was improper when it made misstatements of law and fact. For the following reason, we vacate and remand.

¶ 3 BACKGROUND

¶ 4 Defendant was arrested and charged with possession of a stolen vehicle in connection with events that occurred on August 26 and 28, 2017[1].

¶ 5 At trial, Emmanuel Udoh (Emmanuel) testified that on August 26, 2017, at approximately 10 p.m. he was in the area of 62nd and Ashland in Chicago. He was driving his mother's black 2002 Nissan Xterra to J & J's Fish Shack (J&J). Upon arriving at J&J, Emmanuel parked the vehicle on 62nd Street facing Ashland, so he would be able to drive out easily after retrieving his food. As he was walking to the car from J&J, Emmanuel was approached by two males who asked him "are you going to come off those keys." Emmanuel felt threatened and understood them to mean that he should give them his car keys. Emmanuel had his keys in his hand and one of the men reached for them, at that point Emmanuel lifted the hand the keys were in and swung at the man; he missed. The same man then swung at Emmanuel, striking him, resulting in Emmanuel dropping the keys and backing away from the men. Emmanuel walked home while also calling the police to report the incident.

[1] The events occurred in 2017 and this order will reflect that, however, throughout the trial and pleadings the parties refer to the year in question as 2018.

¶ 6 On August 28, 2017, Emmanuel was informed that the police recovered the vehicle and they wanted him to come in to identify the two men in a photo array. Emmanuel signed a form before viewing the photo array. Emmanuel identified an individual who he thought took the vehicle from him but admitted that the conditions that night were dark, and the incident happened within "seven or eight seconds." Emmanuel identified the State's Exhibit 1 as a title certificate showing that his mother, Mary Udoh, owned the 2002 Nissan Xterra, and confirmed that he and his mother shared the vehicle. Emmanuel identified the State's Exhibit 2 as a photo of the 2002 Nissan Xterra, and it was in the same condition as when he drove it on August 26, 2017.[2] Emmanuel testified that he did not know defendant and did not give him permission to drive his car on August 28, 2017.

¶ 7 On cross examination Emmanuel testified that his name was not on the title, instead it was only in his mother's name. Emmanuel testified that defendant's photo was among the photos that were shown to him, however, he did not identify defendant as one of the two men involved and instead identified a man that was not defendant. Emmanuel clarified that the form he signed before viewing the photo array permitted him to be video and audio recorded.

¶ 8 Chicago Police Officer Daniel Symons testified that on August 28, 2017, at approximately 12:30 a.m., he was working patrol with his partner Officer Girard near 63rd Street and Ashland. Symons testified that he saw a black Nissan Xterra go past his patrol vehicle and he ran the license plates to check for expired registration. The license plate number Z429045 was listed as stolen. Symons then radioed into dispatch to verify that the stolen status was still valid. Symons received confirmation, indicated the direction in which the vehicle was travelling, and proceeded to follow the vehicle westbound on 63rd Street. No other cars were between the stolen car and the patrol car. While waiting for assisting units, Symons activated his lights and curbed the stolen vehicle.

[2] At this time, the State moved to enter Exhibit 2 into evidence and defendant did not object.

Symons exited his vehicle and approached the driver's side of the curbed vehicle. Symons had the driver of the vehicle exit the car and identified the driver to be defendant. Symons' body camera video was shown to the court.

¶ 9 On cross examination, Symons testified that defendant was cooperative during his detainment. He did not observe any damage to the steering column before transporting defendant to the police station and processing him. On redirect examination Symons testified that after processing, Detective Freitag took over the investigation.

¶ 10 Chicago Police Detective Thomas Freitag testified that on August 28, 2017, at approximately 1 a.m. he was working as a detective in a robbery unit and was assigned to this case. Freitag gave defendant his *Miranda* rights and, at defendant's request, talked to him in the processing area at approximately 5 a.m. Freitag identified defendant in court as the person he spoke to. Defendant told Freitag that he saw a man exit a vehicle quickly while on a phone followed by a group of people running toward the car. Defendant stated that he ran towards the car and told the group to not take the car. He got in the vehicle, which had the keys in the ignition and was running, along with another man who he did not know. He stated that he tried to park the vehicle but instead drove away with the other man still inside. The other man stated he wanted to sell the car to which defendant told him no. Defendant told Freitag that he did not see anyone touch the man on the phone and that he did not touch him either. Defendant knew the person on the phone from the neighborhood and he proceeded to drive around looking for the owner so he could give back the car. He could not find him, so he proceeded to keep the car because his car was in the shop and the car was actually helping him. He kept going back to the spot where the man walked away from the car, but never saw him and he did not know where he lived. When Freitag asked defendant

why he did not just take the car to the police, he told him he probably should have but he did not steal the car. At that point, defendant had nothing else to say.

¶ 11 On cross examination Freitag testified that there were many ways to take a statement from someone in custody such as having that person write a statement, write the statement himself, or record the statement where mandated by the law. Those methods were not used to take defendant's statement. Freitag testified that videotape recording is not available to detectives at the seventh district. Emmanuel was videotaped by a detective from another district, who was located at the seventh district at the time. On redirect examination, Freitag testified that he memorialized defendant's statement in his supplemental reports and that defendant's statement was not required to be recorded pursuant to the statute. Emmanuel's identification from the photo array was recorded with Emmanuel's consent. On recross examination, Freitag admitted that he never gave defendant the option to have his statement recorded.

¶ 12 Defendant's motion for a directed verdict was denied.

¶ 13 Defendant sought to have instructions submitted to the jury that included the lesser included offense of trespass to a vehicle. Defendant argued that based on the evidence submitted to the jury, that could be an issue for it to consider. The State objected to the inclusion of the instruction of criminal trespass to a vehicle, arguing it to be inapplicable because no evidence was presented to warrant the jury receiving that instruction. Defendant's statement showed that he took the vehicle by theft and continued to possess it. In rebuttal, defendant argued that no one had identified defendant as having taken the vehicle. It was up to the jury to make credibility determinations on the evidence presented. The trial court denied the request for an instruction on criminal trespass to a vehicle. In denying the request, the trial court provided a short synopsis of the evidence, stating it did not demonstrate that a criminal trespass to a vehicle occurred: defendant

was present when the car was taken by force, got in the car, and two days later was still caught driving the car.

¶ 14 The State entered its exhibits into evidence and rested its case-in-chief. Defendant rested its case without presenting any witnesses.

¶ 15 The trial court informed the jury that the parties were about to present closing arguments and admonished the jury that closing arguments were not to be considered evidence. The court further admonished the jury that the evidence had already been presented and when they go into the jury room, they were to make their determination on the evidence. Additionally, the court stated that if anything was said by the parties in closing arguments that the jurors felt was not based in evidence; it should be disregarded.

¶ 16 The State summarized the evidence as defendant taking something that did not belong to him and consequently was charged with possession of a stolen vehicle. The State argued that possession was established when the bodycam showed defendant in possession of the vehicle. Their case was further supported by Freitag's testimony that defendant admitted that when he saw the vehicle was still running with the key in it, he got in it and drove off. Additionally, the victim established that defendant was not entitled to possession and defendant knew the vehicle was stolen because of the statements that he made to Freitag.

¶ 17 Defendant argued that he did not take anything that did not belong to him which was evident from the testimony presented. Defendant noted that everything in the case was recorded except defendant's statement to Freitag. Freitag did not take defendant's statement by having defendant write it, by writing it for the defendant, or by recording it in any other manner. The reason, defendant argued, was because the photo array yielded negative results as to an identification of defendant. Additionally, there was a series of events that demonstrated that

defendant did not attack the victim, so instead of pursuing the individuals that actually took the vehicle, the state pieced together what they knew and stuck it on defendant. It was up to the jury to determine the statement's credibility.

¶ 18 In rebuttal, the State reiterated that defendant took something without permission and acknowledged that "[t]he police didn't record his statement, because they followed the law. . . "[t]hat's not a crime that they can video record the defendant." Defendant objected, and the trial court overruled the objection. The State continued, "[a]nd he didn't give his permission to be recorded. So, no, there isn't a recording of that, because the police followed proper procedures, and they did their job that day." The State distinguished Emmanuel's recording by arguing that he was a victim, and he gave his consent to be recorded. Lastly, the State argued that it did not matter who Emmanuel picked out of the photo array when defendant was found to be in possession of a stolen vehicle.

¶ 19 The trial court reiterated to the jury that the closing arguments were not to be considered evidence. After deliberation, the jury found the defendant guilty of possession of a stolen vehicle. The proceedings were continued for sentencing.

¶ 20 Prior to sentencing, on June 26, 2018, defendant filed a motion for a new trial. The motion argued that: (1) the State failed to prove defendant guilty beyond a reasonable doubt; (2) the finding was against the weight of the evidence; (3) defendant was denied due process of the law; (4) defendant was denied equal protection of the laws; (5) the State failed to prove every material allegation of the offense beyond a reasonable doubt; (6) defendant did not receive a fair and impartial trial; and (7) the trial court erred in overruling the defendant's motion for a directed verdict at the close of the State's case.

¶ 21 On July 2, 2018, defendant was granted leave to proceed *pro se*. Defendant filed a *pro se* motion to dismiss for lack of personal and subject matter jurisdiction arguing that the state of Illinois needed to have an existing contract with defendant in order for it to sue him and for the trial court to have jurisdiction. The trial court instructed defendant that the charging document was controlling and that the complaining witness was the state of Illinois. Defendant's motion to dismiss was denied.

¶ 22 On July 9, 2018, defendant filed a *pro se* motion for a new trial, arguing that: (1) defendant was not given his *Miranda* rights prior to giving a statement; (2) the statement that was made at the police station was not written or otherwise recorded; and (3) defendant was not picked out of a line-up. At the hearing on August 9, 2018, defendant argued the motion *pro se*. The trial court denied the motion for a new trial finding that: the State properly used statements that defendant made after he was provided his *Miranda* rights; the fact that his statement was not written or videotaped was for the jurors to weigh; and even though he was not picked out of the photo array, he was only charged with possessing a stolen vehicle and not with actually stealing it from the victim. At that point, defendant agreed to have defense counsel represent him going forward.

¶ 23 On August 24, 2018, defense counsel was granted leave to file an amended motion for a new trial, which argued that: (1) the trial court erred in denying defendant's motion to suppress statements[3]; (2) the State failed to prove defendant was guilty of the charge beyond a reasonable doubt; (3) the finding was against the weight of the evidence; (4) defendant was denied equal protection of the laws; (5) the State failed to prove every material allegation of the offense beyond

[3] Prior to trial, defendant filed a motion to suppress any and all statements or communications he made to any law enforcement official on August 28, 2017. The trial court denied the motion finding that the statements made were permissible pursuant to *Oregon v. Elstad*, 470 U. S. 298 (1985).

a reasonable doubt; (6) defendant did not receive a fair and impartial trial when the trial court: (i) allowed two prior convictions (16 5004791 and 12 C 440125) of defendant, in the event that defendant testified, and (ii) denied defense counsel's request for the lesser included offense jury instruction of criminal trespass to a vehicle; and (6) the trial court erred in overruling the defendant's motion for a directed verdict at the closed of the State's case.

¶ 24 On August 29, 2018, the hearing on the amended motion for a new trial occurred. Defendant briefly pointed out that the trial court erred by denying the motion to suppress statement because *Missouri v. Seibert*, 542 U.S. 600, applied. Defendant argued that the State failed to prove defendant was guilty beyond a reasonable doubt because they never called the owner, Mary Udoh, as a witness. Lastly, defendant argued that the trial court erred in denying the jury instructions for a lesser included offense of criminal trespass to a vehicle.

¶ 25 The State argued that the trial court's decision in the motion to suppress was correct. It did not need to call Mary Udoh when there was a certified title showing she was the owner entered into evidence and Emmanuel testified that he did not provide defendant permission to have the car. Lastly, they argued that they did prove defendant was guilty beyond a reasonable doubt.

¶ 26 The trial court determined that it did not matter if the owner testified or not, the issue was possession not ownership. The vehicle was taken from Emmanuel, who testified, while defendant was in possession of it. [4] The amended motion was denied.

¶ 27 At sentencing, the State offered in aggravation defendant's criminal background which included: a 1994 conviction for aggravated discharge of a firearm (94 CR 06243), a 2001 conviction for unlawful use or possession of a firearm by a felon (01 CR 13086), a 2003 conviction for burglary (03 CR 15542), a 2007 conviction for possession of controlled substances (07 CR

[4] Part of the trial court's findings were inaudible for the court reporter.

15631), a 2012 conviction for retail theft (12C4440125), and multiple misdemeanor offenses. The State argued that defendant's 1994 conviction for aggravated discharge of a firearm and 2003 conviction for burglary required him to be sentenced as a Class X offender, which would make his sentencing range 6 to 30 years.

¶ 28 In mitigation, defendant argued that the events of the 1994 conviction occurred when defendant was 15[5] but was adjudicated as an adult. Defendant also offered the following facts in mitigation: obtained his G.E.D., was employed, had high blood pressure, and was diagnosed with a learning disability. Additionally, defendant had a stable family home, but recently lost his mother. As a result, defendant asked for leniency and to be sentenced to six years.

¶ 29 The trial court noted that defendant had five previous felony convictions along with other "minor stuff." Under the totality of the circumstances the trial court found it fitting to sentence defendant as a Class X offender to an eight-year prison term and a three-year mandatory supervised release period.

¶ 30 On the same date defendant filed a motion to reconsider the sentence. The motion argued that the sentence was improper given defendant's background, the trial court considered matters implicit in the offense, the State failed to prove eligibility for enhanced penalty or extended term, and the sentence penalized defendant for exercising his right to trial. There was no argument on the motion, but the trial court found that the sentence of eight years was lenient compared to the 30 years maximum. As such, the motion was denied, and this timely appeal followed.

¶ 31 ANALYSIS

¶ 32 On appeal, defendant contends that: (1) the trial court erred in denying his request to submit an instruction to the jury for the lesser included offense of criminal trespass to a vehicle; (2)

[5] Defendant was 17 when the crime occurred, which was reflected in the PSI created at the time.

defendant should not have been sentenced as a Class X offender, and (3) the State's closing argument was improper when it made misstatements of law and fact.

¶ 33 A. Jury Instruction

¶ 34 The State's theory of the case was that defendant knew the vehicle in his possession was stolen because he was the one who intended to permanently deprive the owner of it. However, the State's witness, Freitag, testified that defendant told him that he jumped in the car in an attempt to stop other people who were trying to steal it and that he continued to look for the owner of the car in order to return it to him. Defendant contends that this evidence, if believed by the jury, would warrant a finding that defendant was not guilty of possession of a stolen vehicle but rather criminal trespass to a vehicle. Accordingly, defendant contends, the trial court was obligated to submit this question of fact to the jury and the failure to do so constituted reversable error.

¶ 35 The State contends that the intent to permanently deprive the vehicle owner is not an element of the charge of possession of a stolen vehicle. Therefore, failure to prove the element of intent did not entitle defendant to a jury instruction on criminal trespass to a vehicle. The State further argued that the trial court properly exercised its discretion in refusing to give an instruction on criminal trespass to a vehicle because there was not sufficient evidence to entitle defendant to such an instruction.

¶ 36 Whether a charged offense includes another as a lesser included offense is a question of law, we review *de novo*. *People v. Thomas*, 374 Ill. App. 3d 319, 323 (2007). "A defendant is entitled to a lesser-included offense instruction only if the evidence at trial is such that a jury could rationally find the defendant guilty of the lesser offense yet acquit him or her of the greater." *Id.* This court must first determine if an uncharged lesser included offense exists, then we may examine the evidence produced at trial. *People v. Kolton*, 219 Ill. 2d 353, 361 (2006). "Under the

charging instrument approach, an offense may be deemed a lesser-included offense even [if] every element of the lesser offense is not explicitly contained in the indictment, as long as the missing element can be reasonably inferred." *Id.* Whether a particular offense is a lesser included of another is a determination to be made on a case-by-case basis using the factual description of the charged offense in the indictment. *Id.* "A lesser offense will be 'included' in the charged offense if the factual description of the charged offense describes, in a broad way, the conduct necessary for the commission of the lesser offense and any elements not explicitly set forth in the indictment can reasonably be inferred." *Id.*

¶ 37 Possession of a stolen vehicle is defined as:

> "(1) A person not entitled to the possession of a vehicle or essential part of a vehicle to receive, possess, conceal, sell, dispose, or transfer it, knowing it to have been stolen or converted. Knowledge that a vehicle or essential part is stolen or converted may be inferred: (A) from the surrounding facts and circumstances, which would lead a reasonable person to believe that the vehicle or essential part is stolen or converted; or (B) if the person exercises exclusive unexplained possession over the stolen or converted vehicle or essential part, regardless of whether the date on which the vehicle or essential part was stolen is recent or remote;* * * " 625 ILCS 5/4-103(a) (West 2018)

¶ 38 Criminal trespass is defined as follows:

> "(a) A person commits criminal trespass to vehicles when he or she knowingly and without authority enters any part of or operates any vehicle, aircraft, watercraft or snowmobile.

A31

(b) Sentence. Criminal trespass to vehicles is a Class A misdemeanor." 720 ILCS 5/21-2 (West 2018)

¶ 39 Here, the State concedes that criminal trespass to a vehicle has been recognized as the lesser included offense of possession of a stolen vehicle by this court. Further, based on the indictment, the factual description of the charged offense of possession of a stolen vehicle broadly describes the conduct necessary for the lesser offense of criminal trespass to a vehicle. *Thomas*, 374 Ill. App. 3d at 323. The indictment stated that defendant committed the offense of possession of a stolen motor vehicle in that defendant, by being in possession of a motor vehicle, possessed said vehicle knowing it to be stolen or converted. This language contained in the indictment for possession of a stolen vehicle plainly and clearly contains the main outline or broad foundation of the offense of criminal trespass to a vehicle. Although the charged offense did not set forth the element of entry, which is required for criminal trespass to a vehicle, that element can be reasonably inferred. *Id.* Having determined that criminal trespass to a vehicle is an uncharged lesser included offense of the charged offense of possession of a stolen vehicle, we now turn to the evidence. *Kolton*, 219 Ill. 2d at 361.

¶ 40 Jury instructions are intended to "provide the jury with correct legal rules that can be applied to the evidence to guide the jury toward a proper verdict." *People v. Lovejoy*, 235 Ill. 2d 97, 150 (2009). "In a criminal case, the trial court is required to properly instruct the jury on the elements of the offense, the burden of proof, and the presumption of innocence." *Id.* "When determining whether a defendant is entitled to a jury instruction on a lesser included offense, the trial court is to consider whether there is some evidence in the record that, if believed by the jury, will reduce the crime charged to a lesser offense." *People v. Eubanks*, 2019 IL 123525, ¶ 72.

"When the court determines that there is insufficient evidence to justify the giving of a lesser included offense instruction, the proper standard of review is abuse of discretion." *Id.*

¶ 41 The trial court concluded that no evidence presented at trial demonstrated that a criminal trespass to a vehicle occurred because defendant was present when the car was taken by force, got in the car, and two days later was caught driving the car. However, the State's evidence also demonstrated that defendant entered the vehicle without authority in what defendant described to Freitag as an attempt to prevent the car from being stolen and to later return it to the owner. Defendant told Freitag that the vehicle that was left running and as the man on the phone walked away from the vehicle, he saw a group of people going towards it: so, he jumped in to keep them from taking it. Defendant told Freitag that he drove away but returned to the area in an attempt to find the man who he saw walk away from the vehicle that night. He continued to return to the area until he was stopped by the police. Defendant told Freitag that he did not see an altercation between anyone. Under the defendant's account as to what had happened, no one had stolen the vehicle, therefore, he was not in known possession of a stolen vehicle. This account, if believed by the jury, could also be considered criminal trespass to a vehicle. Thus, we must conclude that defendant was entitled to a jury instruction of the lesser included offense, because there was some evidence that, if believed by the jury, would result in a lesser included offense. *Eubanks,* 2019 IL 123525, ¶ 72.

¶ 42 B. Plain Error

¶ 43 Generally, in order to preserve an issue on appeal, defendant must raise an objection at trial and preserve it in a posttrial motion. *People v. Bui*, 381 Ill. App. 3d 397, 405 (2008). Failure to preserve an alleged error for review is a procedural default. *People v. Rivera*, 277 Ill. App. 3d

811, 818 (1996). Defendant acknowledges his remaining claims have not been preserved and seeks to have the remaining issues considered under the plain error doctrine.

¶ 44 Under the plain error doctrine, issues not properly preserved can be considered by a reviewing court. Plain error review is appropriate under either of two circumstances: "(1) where the evidence is so closely balanced, so as to preclude argument that an innocent person was wrongfully convicted; or (2) where the alleged error is so substantial that it affected the fundamental fairness of the proceeding, and remedying the error is necessary to preserve the integrity of the judicial process." *Bui*, 381 Ill. App. 3d at 406. Prior to invoking the plain error doctrine, it is important to determine if any error actually occurred. *Id.*

¶ 45 B. Sentencing

¶ 46 Defendant contends that he should not have been sentenced under the mandatory Class X sentencing statute because section 5-4.5-95(b) (730 ILCS 5/5-4.5-95(b) (West 2018)) of the Unified Code of Corrections (Code) considers whether the qualifying convictions would now be classified as Class 2 or greater felonies. Defendant contends his 1994 offense for aggravated discharge of a firearm, which the trial court here used as a predicate offense, would now be under the exclusive jurisdiction of the juvenile court and would not be classified as a felony conviction due to subsequent amendments made to the statute.

¶ 47 Defendant contends that in 2013, the legislature revised the Juvenile Court Act (Act) to raise the maximum age for juvenile jurisdiction from 16 to 17 for offenses that were not subject to automatic transfer. See Pub. Act 98-61 (eff. Jan 1, 2014) (amending 705 ILCS 405/5-120 (West 2018)). Additionally, under the amendments of 2016, defendants 15 years old and older accused of committing a forcible felony in furtherance of an illegal gang activity and having a prior adjudication or conviction, would presumptively be transferred out of juvenile court. See Pub. Act

99-258 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-805(2)(a) (West 2018)). Defendant maintains he would not have been subject to such a transfer. Even though defendant was charged with aggravated discharge of a firearm and attempted murder, defendant had no priors, and it was a domestic matter, not in furtherance of any gang activity. These conditions, defendant contends make it certain that his previous conviction would not now be classified as a Class 2 felony or greater. Defendant acknowledges this claim was not raised below and seeks this court to review the claim under the plain error doctrine. Defendant contends that whenever an improper sentencing determination is made, it affects substantial rights and falls under the second prong of plain error, making the error egregious.

¶ 48 The State contends that defendant forfeited this claim by not raising it previously, and that no error occurred that would warrant plain error review by this court. They argue that defendant's 1994 conviction for aggravated discharge of a firearm should not be excluded from the trial court's consideration of Class X sentencing because it was a Class 1 felony in 1994 and remains one today, citing 720 ILCS 5/24-1.2(a)(2) (West 1994) and 720 ILCS 5/24-1.2(a)(2) (West 2018). Further, the State contends that the changes made to the Juvenile Act are prospective only and not retroactive. The issue is not whether defendant would now be convicted of the qualifying offense but whether he was previously convicted of a qualifying offense citing *Fitzsimmons v. Norgle*, 104 Ill. 2d 369 (1984) as support. Therefore, the State concludes that this court should reject defendant's argument under the statute's plain language.

¶ 49 The issue of statutory construction is a question of law, which we review *de novo*. *People v. Taylor*, 221 Ill. 2d 157, 162 (2006). The statute in question should be looked at in its entirety, encompassing the subject it addresses and the legislature's objective in enacting it. *Id.* Our inquiry must begin with the language itself; this is the most reliable indicator of the legislature's intent. *Id.*

"When the language of a statute is clear, it must be applied as written without resort to further aids or tools of interpretation." *Id.* We cannot remedy an apparent legislative oversight by rewriting a statute in any way that is inconsistent with the statute's clear and unambiguous language. *Id.* Only when the statute is ambiguous may a court consider other tools to help determine the meaning. *Id.*

¶ 50 The statute at issue here is section 5-4.5-995(b) of the Code which states, in pertinent part, the following:

> "(b) When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, except for an offense listed in subsection (c) of this Section, after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now (the date the Class 1 or Class 2 felony was committed) classified in Illinois as a Class 2 or greater Class felony, except for an offense listed in subsection (c) of this Section, and those charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender. * * * " 730 ILCS 5/5-4.5-95(b) (West 2018).

¶ 51 This court has consistently held that the language of this statute is "clear and unambiguous," therefore its "focus is on the elements of the prior offense." *People v. Foreman*, 2019 IL App (3d) 160334, ¶ 46. Since the statute is unambiguous, we need not consider the legislative history. *Id.* at ¶ 43. Additionally, we have held that a previous conviction cannot be used as a predicate offense under section 5-4.5-95(b) if it "would have been resolved with delinquency proceedings in juvenile court rather than criminal proceedings." *People v. Miles*, 2020 IL App (1st) 180736, ¶ 11. Therefore, we agree with defendant, had his 1994 conviction of aggravated discharge of a firearm, been committed after the 2016 amendment, it would have been resolved in juvenile court instead of the criminal courts because he was only 17 years old. He

would not have been subject to automatic transfer, and the offenses he was charged with were not offenses where a presumptive transfer would occur. See 705 ILCS 405/5-120 (West 2018) and 705 ILCS 405/5-130(1)(a) (West 2018). The 1994 conviction is not an offense that is an "offense now * * * classified in Illinois as a Class 2 or greater Class felony." 730 ILCS 5/5-4.5-95(b) (West 2018). The State's brief asks this court to reframe the statute by arguing that the question should be "whether he was previously convicted of a qualifying offense." It is clear from the statute that the words "now classified" requires the court to sentence a defendant according to the current classifications at hand. Had the legislature included the term previously, in addition to "now", it would have expanded the scope of classifications that could have been used as predicate offenses for Class X sentencing. However, the limited nature of "now" appears to demonstrate that the legislature intended to only include that classification for sentencing.

¶ 52 The State's reliance on *Fitzsimmons,* is unpersuasive. 104 Ill. 2d 369. This court has previously held that *Fitzsimmons* is not analogous to the case at hand where "the corresponding indication of the legislature's intent, were not present." *People v. Williams*, 2020 IL App (1st) 190414, ¶ 20. In *Fitzsimmons*, the supreme court was interpreting a different sentencing statute and was not facing the statutory language included in section 5-4.5-95(b). Additionally, the court at that time did not have the amendments to the Act as we do now which make it clear that the amendment to the Act "provided some indication that the legislature intended to treat minors who commit certain crimes differently from adults charged with those crimes." *Id.* Therefore, there was nothing for the courts to consider that would have made their predicate offenses subject to juvenile jurisdiction instead of criminal proceedings as we now have.

¶ 53 We acknowledge the concern of our dissenting colleague; however, we disagree with the dissent's findings. The dissent finds that defendant abandoned his intent to return the vehicle

because he had a car in the shop. However, the evidence demonstrated, through Freitag's testimony, that defendant was found near the scene of the crime. This bolstered defendant's statement to Freitag that he kept returning to the scene of the crime in an attempt to return it. He did tell Freitag that having the car was helpful but never indicated that he abandoned his efforts to find the owner. Whether or not this is story is credible is not a part of the analysis. The dissent cites to *McDonald* partially, which states "defendant is entitled to a jury instruction on a lesser-included offense when there is some evidence in the record that, if believed by a jury, will reduce the crime charged to a lesser offense." 2016 IL 118882. ¶ 25. However, *McDonald* also held that, "the appropriate standard for determining whether a defendant is entitled to a jury instruction on a lesser-included offense is whether there is ***some evidence*** in the record that, if believed by the jury, will reduce the crime charged to a lesser offense; not whether there is some ***credible evidence.***" *Id.* The testimony provided by Freitag produced some evidence that if believed by a jury could reduce the crime of a lesser-included offense.

¶ 54 Based on the aforementioned findings, we conclude that an error did in fact occur with regard to sentencing. *People v. Bui*, 381 Ill. App. 3d 397, 405 (2008). Additionally, we find that such a sentencing error was so egregious as to deny defendant a fair sentencing hearing, thus satisfying the second prong of plain error. See *People v. Polk*, 2014 IL App (1st) 122017, ¶ 15. An additional term of years added to a defendant's sentence because the wrong sentencing scheme was used is an error so substantial that we must correct it in order to preserve the integrity of the judicial process. *Bui*, 381 Ill. App. 3d at 406.

¶ 55 C. Closing Arguments

¶ 56 Defendant contends that the State committed reversible error when arguing to the jury that the law prohibited officers from recording defendant's statement to the police and that defendant

A38

did not give the police permission to record him. This statement was a misstatement of fact and law that significantly undermined defendant's attack on Freitag's testimony regarding defendant's statement to him. Defendant's theory was that the failure to record defendant's statement was a form of police misconduct. The State made the misstatements during their rebuttal; defendant's objection was overruled, leaving defendant without an opportunity to correct the misstatements of law and fact. Defendant acknowledges that he did not preserve this objection in a post-trial motion and seeks for this court to review the claim under the plain error doctrine, or in the alternative, ineffective assistance of counsel for failing to preserve and argue the error in post-trial proceedings.

¶ 57 The State contends that defendant forfeited this claim by not including it in a post-trial motion and no error occurred that would warrant plain error review by this court. The State argues that their comments during closing arguments were properly based on the evidence and reasonable inferences therein and were invited by defense counsel arguments. The State was responding to remarks made by defense counsel that defendant's statement was not recorded by Freitag. The State intended to clarify to the jury that Freitag was not required to video record defendant's statement pursuant to 725 ILCS 5/103-2.1(b),(b5) (West 2018), and could not do so without seeking defendant's permission. The State contends that the offense of possession of a stolen vehicle is not one of the enumerated offenses requiring electronic recording of a defendant's custodial statement.

¶ 58 The State provided a substantive argument of the proper standard of review within their footnotes, which this court has previously held is improper. *Technology Solutions Co. v. Northrop Corp.*, 356 Ill. App. 3d 380 (2005). However, the footnotes contained in the State's response are not excessive. Therefore, we decline to disregard them. The State contends that the proper standard

of review is abuse of discretion, which has been determined recently by our supreme court in *People v. Jackson*, 2020 IL 124112, ¶ 83. We agree that *Jackson* is controlling, however, under either standard a reversal is not warranted. *Jackson* held that, "[a] reviewing court will find reversible error only if the defendant demonstrates that the remarks were improper and that they were so prejudicial that real justice was denied, or the verdict resulted from the error." *Id.* ¶ 83.

¶ 59 Prosecutors are given a wide latitude during opening statements and closing arguments. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2006). "In reviewing a challenge to remarks made by the State during closing argument, the comments must be considered in the context of the entire closing statements of the parties." *People v. Williams,* 192 Ill. 2d 548, 573 (2000). Even if the statement "exceeds the bounds of proper argument, the verdict must not be disturbed unless it can be said that the remark caused substantial prejudice to the defendant." *Id.* Additionally, a prosecutor may respond to comments made by defense counsel that invite a response. *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 47. However, a prosecutor may not misstate the facts or argue facts not in evidence. *People v. Cruz*, 2019 IL App (1st) 170886, ¶ 41.

¶ 60 In closing, defense counsel argued that the videotape was missing because of misconduct. In the State's rebuttal closing argument the prosecutor responded to this theory by stating,

> "His statement isn't recorded. The police didn't record his statement because they followed the law. Detective Freitag showed you the crime that he was charged with. That's not a crime that they can video record the Defendant. They can't just take out a camera and start recording him. * * * "

Section 5/103-2.1(b), (b-5), provides when statements may be used as evidence, each respective offense listed requires recording. However, the statement made by the prosecutor indicated that the detectives were prohibited from videotaping because it was not an enumerated offense, making

A40

the action of videotaping defendant unlawful. This is not what that specific statute provides, and the State has not provided any authority that expresses this.

¶ 61 Additionally, the prosecutor stated,

> "[a]nd he didn't give his permission to be recorded. So, no, there isn't a recording of that, because the police followed proper procedures, and they did their job that day. The reason Emmanuel was recorded was because he's not charged with a crime, he's the victim and. guess what? He consented. He circled, on the form, I consent to being video recorded. I consent to being audio recorded. That's why you have that recording of Emmanuel. * * * "

This statement makes it appear that defendant's refusal to consent was the reason the statement was not recorded. Together these comments were misleading.

¶ 62 Although we agree with defendant that these statements were improper, we must determine if they were so prejudicial as to deny real justice or if the verdict resulted in error. *Jackson*, 2020 IL 124112, ¶ 83. The State's misstatements were made amongst a lengthy closing argument but were not the focus of the argument. Instead, the argument was focused on the entirety of the case. The jury was admonished before and after closing arguments that the arguments were not evidence and if something was said that did not match the evidence, they should disregard it. At trial, Freitag testified that he never gave defendant the option of being recorded. Freitag also noted that this was not the type of case where they videotape defendants who are in custody. Therefore, based on the limited argument made, the evidence being available to clarify those statements, and the trial courts consistent admonishments that the statements were not evidence, we find the statements were not so prejudicial that real justice was denied or that the jury's verdict may have resulted from the error. *Id.*

¶ 63 Since we have held that this did not result in prejudice, defendant's alternate claim of ineffective assistance of counsel necessarily fails. *People v. Clendenin*, 238 Ill. 2d at 317-18. Furthermore, we must also reject his request that we review this claim under plain error review because he has failed to show an error existed. *People v. Bui*, 381 Ill. App. 3d 397, 406 (2008).

¶ 64 CONCLUSION

¶ 65 We find that the trial court erred in refusing the jury instruction for criminal trespass to a vehicle where there was some evidence presented, although by the State, that if believed by a jury, could have resulted in a conviction for that lesser included offense. We further find that defendant was improperly sentenced as a Class X offender. Nevertheless, while we agree that the comments made by the prosecutor were improper, they were not so prejudicial to defendant that real justice was denied or that the jury verdict may have resulted in error. For these reasons, we vacate defendant's conviction and sentence of possession of a stolen vehicle and remand for a new trial. If the new trial results in conviction, the court shall not consider the 1994 aggravated discharge of a firearm conviction for Class X sentencing.

¶ 66 Vacated and remanded.

¶ 67 JUSTICE HARRIS, dissenting:

¶ 68 I agree with the majority that defendant was improperly sentenced as a Class X offender, and with the finding that the prosecutor's improper comments were not so prejudicial to defendant that the jury verdict may have resulted in error. However, I disagree with the determination that the court erred in refusing to instruct the jury on the lesser-included offense of criminal trespass.

¶ 69 There is no authority that intent to permanently deprive is an element of the offense of possession of a stolen motor vehicle. *People v. Washington*, 184 Ill. App. 3d 703, 708 (1989). However, the intent to permanently deprive element may come into play where the defendant was

the alleged thief who stole the car. See *People v. Cozart*, 235 Ill. App. 3d 1076, 1081 (1992); see also *People v. Pollards*, 367 Ill. App. 3d 17, 23 (2006) (finding that where a conviction for possession is predicated on possession by the same person who committed the theft, and his intent was not clearly established by the evidence, jury instructions that define theft as having the intent to permanently deprive may be required). If it was the defendant who stole the vehicle, he could be convicted of possession by showing he possessed the vehicle because "defendant would have to know he had stolen or converted" the vehicle. *People v. Cramer*, 85 Ill. 2d 92, 100 (1981). It follows that if the defendant could show his mental state was inconsistent with that required for theft, he could not be convicted of possession of a stolen motor vehicle. *Washington*, 184 Ill. App. 3d at 708.

¶ 70 Defendant contends that the State's theory at trial was that he stole the Udoh's Nissan. He argues that his mental state was inconsistent with that required for theft because he took the vehicle only to keep others from stealing it and intended to return the vehicle to the owner. However, whether defendant intended to steal the Nissan when he took the car became a non-issue once he kept the vehicle without authorization and without manifesting an intent to return it. "[T]he intent to deprive an owner of his property may be inferred simply from the act of taking another's property. Likewise, it may be inferred from the lack of evidence of intent to return the property or to leave it in a place where the owner could safely recover it." *People v. Adams*, 161 Ill. 2d 333, 343–44 (1994).

¶ 71 Although defendant said that he only took the Udoh's vehicle to keep others from stealing it, and he intended to return the vehicle, the evidence showed otherwise. Defendant was found driving the vehicle more than a day after the incident. He admitted that he could have taken the vehicle to the police, but he did not. He could have also taken other measures, such as leaving the

car at the place where he last saw Udoh or searching for information in the car that would identify the owner. He did not do so. Rather, defendant explained that he kept the Udohs' vehicle because his car was in the shop. Defendant, however, did not have their permission to use the vehicle. The evidence at trial thus showed an intent to deprive the Udohs of their property and contradicted defendant's claim that he intended to return the property to its rightful owner.

¶ 72 When there is a request for an instruction on a lesser-included offense, the court must examine the evidence adduced at trial to determine whether it rationally supports a conviction for the lesser-included offense. *People v. Phillips*, 383 Ill. App. 3d 521, 540 (2008). Defendant is entitled to a jury instruction on a lesser-included offense when there is some evidence in the record that, if believed by a jury, will reduce the crime charged to a lesser offense. *People v. McDonald*, 2016 IL 118882. ¶ 25. Given the lack of evidence establishing defendant's intent to return the vehicle or leave it in a place where the Udohs could safely recover it, the trial court did not abuse its discretion in refusing to give a jury instruction on criminal trespass. See *Id.* ¶ 57. Therefore, I respectfully dissent.

2020 IL App (1st) 161632-U
No. 1-16-1632
Order filed March 31, 2020
Modified on rehearing June 1, 2020

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CR 2090
	)	
JAMAL SUGGS,	)	Honorable
	)	Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Griffin and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* The State proved Jamal Suggs guilty of robbery and unlawful restraint beyond a reasonable doubt where the primary eyewitness provided a sufficiently reliable identification. The trial court improperly imposed a Class X sentence. We affirmed in part, vacated in part, and imposed a Class 2 sentence of seven years.

¶ 2 The trial court found Jamal Suggs guilty of robbery and unlawful restraint and imposed a 16-year sentence. The State's principal witness identified Suggs as one of three men who robbed a pharmacy. Suggs argues that his convictions rested entirely on this witness's dubious identification testimony. We disagree and affirm his conviction. While the robbery occurred

quickly and under highly stressful circumstances, the eyewitness had seen Suggs in the pharmacy every day for three days leading up to the robbery. The robber wore the same sweatshirt that Suggs wore to the pharmacy the day before the robbery and the same eyewitness identified Suggs in a photo array. Taking the evidence in the light most favorable to the State, as we must, we cannot say it was irrational for the trial court to find Suggs guilty.

¶ 3 Suggs also argues that the trial court improperly found him eligible for Class X sentencing based on his criminal history. Specifically, he argues that the trial court should not have considered his first predicate offense because, had he committed that offense at the time of this offense, he would have been adjudicated delinquent as a juvenile, not convicted as an adult. Following the reasoning of this court's recent decision in *People v. Miles*, 2020 IL App (1st) 180736, we agree. We vacate Suggs's Class X sentence and exercise our authority under Illinois Supreme Court Rule 615(b)(4) to impose a Class 2 sentence of seven years.

¶ 4 Background

¶ 5 On the afternoon of December 19, 2014, three people robbed an independent pharmacy. They took cash, a purse and cell phone, and two bottles of promethazine with codeine, commonly known as "lean." At Suggs's bench trial, pharmacy employees Melene Jones and Leanna Gryz testified that they saw three men come into the pharmacy at around 2:30 p.m. Jones noticed the eyes of one of the offenders as "green and kind of buggy," and he wore a blue hoodie which had a "symbol of a horseshoe" on the front. On cross-examination, Jones agreed the horseshoe symbol is the logo of the brand "True Religion."

¶ 6 Jones saw the same person in the pharmacy each of the three days before the robbery. On December 18, a man came in wearing a similar hoodie. He came in with a woman, who asked

about medication. The man stood "behind her kind of peeking over the door." After Jones told them the pharmacy owner did not want the man in there, "him and the girl just turned around and left out." Surveillance footage from that day shows the man and the woman in the pharmacy for 20 seconds.

¶ 7 On December 17, Jones saw who she believed to be the same man and noticed "just skin tone, [and] his eye color. That's pretty much it." The man "came to the window and proceeded to ask [Jones] more questions about medication." There is no surveillance video from this day. On December 16, Jones saw the same man looking through a window in the pharmacy and asked if she could help him. That day she noticed the man's eyes, skin tone, height, and "small build." There is no surveillance video from this day either, but Jones estimated the entire encounter lasted 30 to 35 seconds.

¶ 8 Responding Chicago Police Officer Francisco Luevano testified that Jones told him that one of the robbers wore a black hooded sweatshirt and blue jeans and had brown eyes, another wore a black hoodie, and the third robber wore a red jacket. Gryz could not give a description of the offenders. Detective Ferguson similarly testified that Jones told him on the day of the robbery that one offender had brown eyes and wore a black hooded sweatshirt, dark pants and boots, another offender had a hoodie on and darker pants but she was unsure of his footwear, and she did not get a good look at the third offender. Jones told Ferguson that one of the robbers was at the pharmacy three consecutive days before the robbery.

¶ 9 A few days later, Detective Ferguson returned to the pharmacy and looked at surveillance footage from December 18 and 19 multiple times with Jones and Gryz. In the surveillance

A47

footage from December 18, the offender who Jones identified as Suggs had on a dark colored hooded sweatshirt with white piping and a True Religion horseshoe logo on the chest.

¶ 10 The video footage from the day of the robbery shows 41 seconds elapsing between the time the three men walked up to the pharmacy counter to when they ran out of the store. One of the men wore a dark colored hooded sweatshirt with white piping and True Religion logo like the sweatshirt on the man who had been in the store the day before. The sweatshirt was tied tightly around the man's head and face, and he had a black mask covering the bottom half of his face—only his eyes were visible.

¶ 11 The trial court found Suggs guilty of robbery and unlawful restraint. Though both Jones and Gryz identified Suggs in court, because Gryz could not make a pretrial identification, the court found that "the case turns on the testimony and efficacy of the identification of Mr. Suggs by Ms. Jones." In finding the identification sufficient, the court emphasized that the person in the pharmacy on the 19th "was wearing his clothing in precisely the same manner as Mr. Suggs was the day before."

¶ 12 After a sentencing hearing, the court found that it was obligated to sentence Suggs as Class X offender based on his criminal history, which included a 2011 felony conviction for burglary and a 2012 felony conviction for robbery. The trial court sentenced Suggs to 16 years in prison.

¶ 13 Analysis

¶ 14 Suggs challenges his conviction on reasonable doubt grounds, arguing the State's key witness failed to reliably identify him. He also raises several challenges to his sentence—two arguments that the trial court erred in finding him eligible for Class X sentencing, and one

argument challenging his sentence as excessive. We find the State proved Suggs guilty beyond a reasonable doubt, but that the trial court erred in imposing a Class X sentence.

¶ 15 Reasonable Doubt

¶ 16 Suggs primarily argues that we should reverse his convictions outright because Jones's identification was so unreliable that the State failed to prove him guilty beyond a reasonable doubt. A challenge to a criminal conviction based on the sufficiency of the evidence asks whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Lloyd*, 2013 IL 113510, ¶42. We view all reasonable inferences in favor of the prosecution, and reverse should the evidence be so improbable, unsatisfactory, or inconclusive as to establish a reasonable doubt of guilt. *Id.*

¶ 17 To determine the reliability of eyewitness identifications, we look to the totality of the circumstances, and consider five factors: (i) the witness's opportunity to observe the offender at the scene, (ii) the witness's level of attention at the time of the crime, (iii) the accuracy of prior descriptions, (iv) the witness's level of certainty at the identification confrontation, and (v) the time between the crime and confrontation. *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972). Illinois courts also consider a sixth factor—the witness's acquaintance with the suspect. *People v. McTush*, 81 Ill. 2d 513, 521 (1980).

¶ 18 *Opportunity to Observe*

¶ 19 Suggs argues that Jones did not have a sufficient opportunity to view the offender's face during the robbery. When considering this factor, we examine "whether the witness was close

enough to the accused for a sufficient period of time under conditions adequate for observation." *People v. Tomei*, 2013 IL App (1st) 112632, ¶ 40.

¶ 20 We agree that Jones's opportunity to view the offender was brief and that the offender's hood had been pulled tight around his face and he wore a mask, leaving a small opening for his eyes. The surveillance video from the robbery shows that 41 seconds elapsed between the time the robbers approached the pharmacy counter and ran out of the store. Of those 41 seconds, Jones looked at the man she identified as Suggs for at least 15 of those seconds. We have repeatedly upheld convictions where the witness was able to observe the defendant for only "a few seconds" or "a couple of seconds." *People v. Negron*, 287 Ill. App. 3d 519, 531 (1998) (collecting cases). We find that the relatively short encounter does not diminish the reliability of Jones's identification and that the first *Biggers* factor weighs slightly in favor of the reliability of the identification.

¶ 21 *Degree of Attention*

¶ 22 Suggs argues that Jones's degree of attention could not yield a reliable identification. We acknowledge the high stress of this situation. The men barged into the drug dispensing area and ordered Jones and Gryz to the ground with a gun. Jones believed the men were going to kill her. Gryz was unable to give the police any description of the robbers because she was in shock and scared. Based on this testimony, Suggs relies on "weapon focus," the idea that the presence of weapons impairs eyewitness memory and identification accuracy. *See People v. Allen*, 376 Ill. App. 3d 511, 525 (1st Dist. 2007) (studies show witness's weapon focus "indicates less attention is paid to encoding the perpetrator's characteristics"); *People v. Clark*, 124 Ill. App. 3d 14, 21

A50

(1st Dist. 1984) (psychological data shows "one tends to focus on a weapon which is pointed at him, rather than on the person holding it").

¶ 23 We accept the idea of weapons focus as a general matter, but our review of the surveillance video does not show Jones was overcome by fear of a weapon. At least once she confronts the man holding the gun and looks directly at his face. We find that Jones's degree of attention weighs slightly in favor of reliability as she does not appear to have been substantially impacted by the presence of a weapon.

¶ 24 *Previous Descriptions*

¶ 25 Suggs argues that Jones's different descriptions favor finding her identification unreliable. Jones testified that she gave the police the "best possible description" of the three offenders shortly after the robbery. She testified that she told the police the offenders' race and gender, and that Suggs had light skin and green eyes, was "pretty tall" and "kind of thin," and wore a blue hoodie and blue jeans. Officer Luevano, the responding officer, testified that both Jones and Gryz reported that one offender wore a black hoodie and had brown eyes, the second offender also wore a black hoodie, and the third wore a red jacket. Luevano testified that those were the only descriptions provided in the flash message.

¶ 26 Detective Ferguson testified that Jones told him on the day of the robbery that one offender had brown eyes and wore a black hooded sweatshirt, dark pants and boots; another offender had a hoodie on and darker pants but she was unsure of his footwear, and she did not get a good look at the third offender. Neither officer said Jones described the offenders' ages, weights, hairstyles, or any characteristics like a scar or eyeglasses.

¶ 27 The description Jones gave to the police contradicted her description of the offender at trial. Jones testified that the man, whom she identified as Suggs, wore a blue hoodie with a symbol of a horseshoe on it, brown Timberland boots, and blue jeans, and had distinguishing green eyes. Gryz also testified that the man had "very pretty" greenish-hazel eyes that stood out. But neither mentioned green eyes to the police, but rather reported that the man's eyes were brown.

¶ 28 We acknowledge the slight inconsistencies between Jones's description of Suggs's eye color and the color of his hoodie. We note that Jones denied telling the officers that Suggs had brown eyes. These inconsistencies are of the type that it was the trial court's job to resolve. *E.g., People v. Tenney*, 205 Ill. 2d 411, 428 (2002).

¶ 29 Suggs argues that Jones's identification of Suggs as one of the offenders had been likely influenced and cemented by her multiple viewings of the surveillance video from the day before, showing a woman in the pharmacy accompanying a man wearing a True Religion sweatshirt. We disagree. Jones gave most of her physical descriptions of Suggs to the officers before viewing the surveillance video. As to eye color specifically, we do not see how watching the video could have assisted Jones in identifying the color of anyone's eyes. The footage is not good enough to show it. Applying the deference we owe to the trial court's resolution of inconsistencies in the evidence, we find this factor weighs slightly in favor of the reliability of her identification.

¶ 30 *Level of Certainty*

¶ 31 Suggs admits that the fourth *Biggers* factor, the witness's certainty at the time of identification may appear to support a finding of a reliable identification, but argues that Jones's certainty was influenced by her multiple viewings of the surveillance video from the day before

the robbery. We reiterate the view, expressed many times in majority and separate opinions in this court, that the factor of witness certainty is exceedingly unreliable. *People v. Fountain*, 2016 IL App (1st) 131474, ¶ 159 (Hyman, J. dissenting) (even the most confident witnesses are wrong 20% to 30% of the time); *People v. Starks*, 2014 IL App (1st) 121169, ¶ 72 (urging expert testimony on remand due, in part, to the "weak correlation between a witness's confidence in his or her identification and its accuracy"); *id.* at ¶¶ 85-9 (Hyman, P.J. specially concurring, joined by Pucinski, J.) (collecting cases)). Nevertheless, Suggs does not meaningfully challenge this factor and Jones was confident when identifying Suggs from the photo lineup. So we find that Jones's level of certainty at the time of identification weighs slightly in favor of reliability.

¶ 32 *Time Between the Offense and Identification*

¶ 33 Suggs argues that the time between the event and the identification undermines the reliability of Jones' identification. The robbery occurred on the 19th and Jones made her identification of Suggs on the 26th. Only a week lapsed between the event and identification, we find that this factor weighs in favor of reliability. *E.g., People v. Simmons*, 2016 IL App (1st) 131300, ¶ 97 (approving time gap of up to two weeks).

¶ 34 *Jones's Familiarity with Suggs*

¶ 35 Jones's testimony shows that she was familiar with Suggs's appearance, because he was in the pharmacy the day before. The trial court focused heavily on the fact that the robber "was wearing his clothing in precisely the same manner as Mr. Suggs was the day before." We have held that "a conviction should not be sustained on the basis of reference to clothing alone." *People v. Brown*, 131 Ill. App. 2d 717, 720 (1970) (citing *People v. Reed*, 103 Ill. App. 2d 342 (1968)). When it comes to identifications that rely on clothing, we have always required

something more. *E.g., People v. Brown*, 47 Ill. App. 3d 920, 927 (1977) (officers saw defendant committing offense, noted his clothing, and then identified him after a continuous chase) (citing *People v. Davis*, 95 Ill. App. 2d (1968) (same)); *People v. Ruderson*, 129 Ill. App. 2d 271, 279 (1970) (distinguishing case where defendant is identified "mainly by his clothing" as opposed to where "the victim recognized his face, his walk, his voice, his build and his ring"); *Brown*, 131 Ill. App. 2d at 720 (officer able to identify "defendant's face and clothing").

¶ 36 Here, Jones was able to provide descriptions of more than just Suggs's clothes. She described his build, his height, his skin tone, and his eye color. Because Jones's recognition of Suggs rests on more than a single article of clothing, we find this factor weighs in favor of the reliability of Jones's identification.

¶ 37 We recognize this is a close case. Faithfully applying the standard of review, however, requires us to find that the State proved Suggs guilty beyond a reasonable doubt. We affirm Suggs's conviction.

¶ 38 Eligibility for Class X Sentencing

¶ 39 Suggs also argues that the trial court erred when it found him eligible for Class X sentencing on two grounds: (i) the first predicate offense, which he committed in 2011 at the age of 17, would have been adjudicated in Juvenile Court at the time of the present offense and should not count as a "conviction" for the purposes of the Class X statute; and, (ii) even if the 2011 offense counts as a "conviction," it was not entered in the proper sequence prescribed by the Class X statute because the sentence was imposed at the same time as the sentence for his second predicate offense. The State responds that, even if Suggs's 2011 offense would have been handled in the juvenile system under current law, the offense he committed still was classified as

a Class 2 offense. According to the State, the sequencing for the two predicate offenses was also proper.

¶ 40 Before we address the merits, the State urges us to decline review as forfeited. Ordinarily, a defendant's failure to object to an alleged sentencing error and failure to include that error in a postsentencing motion would forfeit the issue on appeal. *People v. Jackson*, 2011 IL 110615, ¶ 10. But, as Suggs correctly argues, "a sentence that is not statutorily authorized affects a defendant's substantial rights and will generally be reviewed, despite any possible forfeiture, under the second prong of the plain error doctrine." *People v. Foreman*, 2019 IL App (3d) 160334, ¶ 42. We note that the language of this exception— "a sentence that is not statutorily authorized"—sounds concerningly similar to the now-repudiated void-sentence rule. See generally, *People v. Castleberry*, 2015 IL 116916. But, we have previously held that statutorily non-conforming sentences, while they used to be void, also affect substantial rights and are amenable to traditional plain error review. *People v. Strawbridge*, 404 Ill. App. 3d 460, 470 (2010).

¶ 41 As a factual matter, we see no circumstance under which altering Suggs's sentencing range from 3-7 years to 6-30 years, in alleged contravention of a statute, would not affect his substantial rights. So we review Suggs's claim under the second prong of plain error.

¶ 42 The Class X enhancement statute provides:

> "When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony *** after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now *** classified in Illinois as a Class 2 or greater Class felony *** and those charges are separately

brought and tried and arise out of a different series of acts, that defendant shall be sentenced as a Class X offender. This subsection does not apply unless:

(1) the first felony was committed after February 1, 1978 ***;

(2) the second felony was committed after conviction on the first; and

(3) the third felony was committed after conviction on the second."

730 ILCS 5/5-4.5-95(b) (West 2018). Suggs's first argument contends that his "first felony," as required by subsection (1), does not qualify as a valid predicate. This follows, he claims, because had he been charged with the predicate offense at the time he was charged with the present offense (2015), he would have been charged as a juvenile. And, according to him, juvenile adjudications are not "convictions" within the meaning of section 5-4.5-95(b).

¶ 43 As Suggs highlighted in a motion to cite additional authority, another division of this court, in an opinion authored by Justice Hoffman, recently ruled favorably to him on this question. *People v. Miles*, 2020 IL App (1st) 180736. We agree with *Miles* and apply it, though the application to Suggs's sentencing is slightly different.

¶ 44 The defendant in *Miles* received a Class X sentence based, in part, on a 2006 conviction for aggravated vehicular hijacking with a firearm and armed robbery. *Id.*, ¶ 3. This court found the defendant's 2006 conviction to be an invalid predicate because, had it been committed on the date of the present offense, it "would have been resolved with delinquency proceedings in juvenile court rather than in criminal proceedings." *Id.*, ¶ 11. The court reasoned that the language in section 5-4.5-95(b)—"an offense now *** classified in Illinois as a Class 2 or greater Class felony" required this result because the defendant's 2006 offense would not have been so classified had the defendant committed it in 2016. *Id.*

¶ 45 The logic continues that, because section 5-4.5-95(b) uses the word "conviction," and, in Illinois, a juvenile adjudication is not a "conviction," an offense that would have been resolved in juvenile court had it been committed in the present day did not fall within the plain language of the statute. *Id.*, ¶¶ 15-16 (citing *People v. Taylor*, 221 Ill. 2d 157, 176 (2006) (holding juvenile adjudications do not constitute convictions)). The court then, at some length, distinguished section 5-4.5-95(b) from other statutes expressly allowing the consideration of juvenile adjudications, see *id.*, ¶¶ 12-16, and from other cases decided before the Juvenile Court Act was amended to assert exclusive jurisdiction over minors who committed armed robbery. See *id.*, ¶¶ 18-21. We need not reiterate this analysis; suffice it to say, we find it persuasive.

¶ 46 *Miles* applies to Suggs's sentencing, although in a slightly different way. In *Miles*, when the defendant committed his first predicate offense in 2006 at age 15, he was nonetheless excluded from the jurisdiction of the juvenile courts because the aggravated vehicular hijacking offense he committed subjected him to criminal process in adult court. See 705 ILCS 405/5-130 (West 2006). In 2016, the legislature removed that offense from the list of offenses excluding minors from the jurisdiction of the juvenile courts. *Miles*, 2020 IL App (1st) 180736, ¶ 6 (citing Pub. Act. 99-258, § 5 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130)).

¶ 47 We, however, are not dealing with the Excluded Jurisdiction provision of the Juvenile Court Act (§ 405/5-130). In 2011, Suggs was convicted of simple robbery, which would not have excluded him from juvenile court jurisdiction if he otherwise fell within it. See 705 ILCS 405/5-130 (West 2010). Suggs was excluded from juvenile court jurisdiction because of his age, 17. See 705 ILCS 405/5-120 (West 2010) (limiting juvenile court jurisdiction over minors under 17 for felony offenses). The General Assembly amended the Juvenile Court Act to assert

jurisdiction over minors under 18 in 2014. See Pub. Act. 98-61 (eff. Jan. 1, 2014) (amending 705 ILCS 405/5-120)). Thus, had Suggs committed the predicate offense in 2015, at the time of the present offense, the Act would have required the State to proceed with an adjudication in the juvenile system absent a successful petition for transfer. See 705 ILCS 405/5-805 (West 2016). The State makes no argument about the transfer provisions.

¶ 48 In 2015, Suggs's first predicate offense would have been a juvenile adjudication, not a criminal conviction, and, accordingly, it cannot be a valid predicate under the plain language of the Class X statute. *Miles*, 2020 IL App (1st) 180736, ¶ 22.

¶ 49 The State also filed a motion to cite additional authority. We initially denied the motion, but during oral argument, changed course and allowed its filing. The State's motion cites cases decided in 2015, 1990, 1984, and 1979—4, 29, 35, and 40 years before the State filed its initial brief. Suggs's arguments about Class X sentencing were in his original brief and the State was not surprised by them. We strongly urge the State (and defense counsel) to remember that motions to cite additional authority are used to draw this court's attention to relevant cases decided *after* the submission of the briefs. They are not a repository for additional case research counsel wishes had been included in the original briefing.

¶ 50 The State cites *People v. Richardson*, 2015 IL 118255, where our supreme court affirmed the prospective application of the amendment to the exclusive jurisdiction provision of the Juvenile Court Act. We have no quarrel with that holding. But, we are not interpreting the Juvenile Court Act; we are interpreting the mandatory Class X statute, which requires us to imagine what a previous conviction would be classified as at the time of the present offense. We do not hold (and *Miles* did not hold) that Suggs's first predicate offense *is* a juvenile

adjudication; we hold that Suggs's first predicate offense *would be* a juvenile adjudication if committed at the time of the present offense. Accepting the prospective application of Section 405/5-120, that proposition is indisputably true.

¶ 51 The State next relies on *Fitzsimmons v. Norgle*, 104 Ill. 2d 369 (1984) and emphasizes this language: "The statutory definition of conviction *** would clearly include [the defendant]'s first offense even though he was a juvenile tried in adult court." *Id.* at 373. The State urges us to conclude that convictions do not lose their status as convictions by virtue of a defendant's young age. But the State's own emphasis defeats its position—there, the defendant was "a juvenile tried *in adult court.*" In other words, the State is right that a conviction obtained in adult court is no less a conviction because the offender was a juvenile. But here, had Suggs been tried for his first predicate in 2015, he would not have been a juvenile tried in adult court; rather, he would have been a juvenile adjudicated delinquent in juvenile court. *Fitzsimmons* does not negate the reasoning in *Miles*.

¶ 52 The State's citation to *In re Greene*, 76 Ill. 2d 204 (1979), is similarly unavailing. *Greene* holds that a minor's age is not an element of the offense with which the minor is charged when he or she is accused of being delinquent under the Juvenile Court Act. *Id.* at 212. According to the State, this holding defeats Suggs's argument because Suggs purportedly claims that "the elements of the offense had changed since he could not have been prosecuted for burglary in 2015 since he [was] only 17 at the time of the offense." The State does not cite Suggs's briefs for that gloss on his argument, and we do not find it anywhere. Suggs is not arguing that the elements of his first predicate offense had changed; he argues that, in 2015, the State would have had to prove those elements in juvenile court, not adult court.

¶ 53 Finding none of the State's additional authority place any doubt on *Miles*, we vacate Suggs's sentence and impose a new sentence of seven years.

¶ 54 Considering our disposition, we need not address Suggs's other sentencing arguments. In the interest of completeness, the fourth case the State relies on in its motion to cite additional authority, *People v. Franklin*, 135 Ill. 2d 78 (1990), addresses one of Suggs's other sentencing arguments, and, as we are not reaching those arguments, we do not address *Franklin*.

¶ 55 After our original disposition, Suggs filed a petition for rehearing and motion for release on bond pending further appeal. The petition for rehearing urges us to exercise our authority under Illinois Supreme Court Rule 615 to impose a seven-year sentence (the Class 2 maximum) as opposed to remanding for resentencing. Suggs argues that he has already served the maximum amount of time he would be required to serve on a seven-year sentence and that, in light of the COVID-19 pandemic, health concerns require his immediate release.

¶ 56 We allowed rehearing and ordered the State to file a response to Suggs's petition for rehearing and the bond motion. We also received and considered Suggs's reply.

¶ 57 The State responds that we should decline to exercise our Rule 615 authority because the trial court could have sentenced Suggs to a discretionary extended term of up to 14 years based on his criminal history. The State also urges we reject Suggs's request for bond, but offers, in the alternative, a list of conditions that should be imposed were we to grant the motion.

¶ 58 As to Suggs's argument that we should impose a seven-year sentence without a remand, we, undoubtedly, have the authority to impose a new sentence when we find "the trial court's sentencing decision was unlawful or an abuse of discretion." *People v. Jones*, 168 Ill. 2d 367, 378 (1995); Ill. S. Ct. Rule 615(b)(4). We are to use that power "cautiously and sparingly." *Id.* In

deciding whether to invoke Rule 615(b)(4), we consider "all of the surrounding circumstances of each particular case" including the presence or lack of additional evidence to offer on remand, whether the proof presented to the trial court the first time was "relatively straightforward and uncomplicated," and whether it would unnecessarily burden the court and the parties to remand for resentencing. *Id.*

¶ 59 Although we vacated Suggs's Class X sentence, Suggs is eligible for a discretionary extended term sentence as a Class 2 offender. See 730 ILCS 5/5-5-3.2(b)(1) (West 2018). The sentencing range for an extended term for a Class 2 offense is 7 to 14 years. Because an extended term is not mandatory, on remand, Suggs's sentencing range would functionally be 3 to 14 years.

¶ 60 Suggs points to two cases in which Illinois courts vacated extended term sentences and imposed the maximum non-extended term sentence where it was clear that the trial court's intent was to impose the maximum available penalty. *People v. Reese*, 2017 IL 120011, ¶ 85; *People v. Ware*, 2014 IL App (1st) 120485, ¶ 32. The State points to other cases where we have said resentencing is the best way forward when the trial court imposed a sentence relying on the wrong sentencing range. *People v. Hall*, 2014 IL App (1st) 122868, ¶ 15 (citing *People v. Owens*, 377 Ill. App. 3d 302, 305-06 (2007)). The State also argues that we took a different course in *Miles*, the case we relied on to vacate Suggs's Class X sentence; but, there, this court declined to exercise its authority to impose a lesser term of mandatory supervised release as the defendant's IDOC status was "absconder" and his discharge date was "to be determined." *Miles*, 2020 IL App (1st) 180736, ¶ 23. No similar impediment applies here.

¶ 61 Our review of the case law does no more than confirm what Suggs argues: we retain broad discretion under Rule 615(b)(4). We have imposed sentence ourselves when the trial court sentenced under the wrong sentencing range (*Ware*) and we have declined to do so under similar circumstances (*Hall* and *Owens*). Ultimately, the balancing considerations in *Jones* guide us.

¶ 62 Importantly, under *Jones*, the State has not pointed to new information that would be available to the trial court at resentencing. The State also has not directed us to information the trial court relied on that was particularly complicated or unusual. In light of COVID-19 and the Illinois Supreme Court's recent ruling setting out slow reopening of the circuit courts, see *In re Illinois Courts Response to COVID-19 Emergency*, M.R. 30370 (May 21, 2020), we find substantial costs to both the court and the parties in returning this case to the circuit court. We will exercise our authority under Rule 615(b)(4) to "reduce the punishment imposed by the trial court."

¶ 63 The State's response agrees that the record shows the trial court's intent to impose "a mid-range sentence in what it believed to be the applicable Class X range." So, this case is not so far off from *Reese* and *Ware*, where we exercised our authority to impose a new sentence in line with the trial court's expressed intent. We also find the trial court would likely have imposed an extended term sentence given its 10-year departure from the Class X minimum. We agree that a mid-range sentence accounts for both the seriousness of Suggs's offense (robbery at gun point) and his criminal history (one similar offense) as well as taking mitigation into consideration—Sugg's relatively young age at the time of offense, relatively short criminal history, and that he was not personally armed. We grant Suggs's request and impose a sentence of seven years,

which is both the ordinary Class 2 maximum and near the midpoint of the extended Class 2 sentencing range.

¶ 64 In support of his motion for an appeal bond, Suggs argues that any sentence under 10-and-a-half years is satisfied by the 5 years, 2 months, and 19 days of actual time he as served. According to Suggs this mean he will have served "significantly more time than legally authorized before [our] mandate issue[s]." That is incorrect. Our imposition of a seven-year sentence means that the Department of Corrections is "legally authorized" to keep Suggs incarcerated for seven years. Suggs's reliance on his anticipated good time credit is misplaced reliance on credit DOC is not required to give. *People v. Peacock,* 2019 IL App (1st) 170308, ¶ 19 (quoting *People ex rel. Colletti v. Pate*, 31 Ill. 2d 354, 357 (1964) ("Good time, although part of every sentence is a conditional right which may be forfeited")). At all times and at any time, DOC could revoke Suggs's good time credit and he could serve the entire seven-year term of his sentence.

¶ 65 That said, even where a defendant has many years left on his sentence, we have the authority to order Suggs "admitted to bail and the sentence or modifying condition of imprisonment *** stayed, with or without bond." Ill. S. Ct. Rule 609(a) (eff. Feb. 6, 2013). The rule expressly gives that authority to both the trial *and* reviewing courts. *Id.* We first address Suggs's COVID-19 concerns, as they are the most pressing. In his motion for an appeal bond, he argues that "prisons are especially dangerous closed spaces." To support that claim, in his rehearing reply, he cites to a DOC memorandum about COVID-19, which confirms that at least one person at the facility where Suggs is incarcerated has tested positive for the illness. See Illinois Department of Corrections COVID-19 Response Memorandum, (May 4, 2020)

(www.illinois.gov/idoc/facilities/Documents/COVID-19/CommunicationsCustody/COVID-19%20Update%202.pdf). He also cites a DOC information page showing a total of 386 COVID-19 cases DOC-wide with 323 of those cases ending in full recovery so far. See COVID-19 Response (www.illinois.gov/idoc/facilities/Pages/Covid19Response.aspx) (last visited May 24, 2020). We may take judicial notice of information on the DOC's website. *People v. Lindsey*, 2016 IL App (1st) 141067, ¶ 28.

¶ 66 We consider the threat of COVID-19 serious, but the same page that Suggs cites shows that the only case occurring in the facility where he is held has been from a staff member. See COVID-19 Response. To date, no inmate has contracted the illness. *Id.* We must deal with the threat as it exists now; we cannot rely on system-wide data when the localized infection rate for the facility housing Suggs remains low.

¶ 67 In light of the COVID-19 information we have, the State's arguments carry substantial force. Initially, we note that the Class 2 felony of which Suggs was convicted is a bailable offense. See 725 ILCS 5/110-4(a) (West 2014). The factors courts use to determine the amount of bail or conditions of release are too numerous to list. 725 ILCS 5/110-5(a) (West 2018). We can narrow our focus based on the State's arguments. According to the State, we should deny an appeal bond because: (i) Suggs's criminal history includes "multiple forcible felonies"; (ii) he has failed to "conform his conduct to the law" after unsuccessful attempts at probation and supervised release; (iii) the crime relevant here was violent because of Suggs's conduct and his co-offender's decision to carry a gun. We agree. The conduct, and the nature of Suggs's previous convictions, carries an imminent risk of violence. Suggs showed a willingness to re-offend shortly after his previous releases. Moreover, the mitigation Suggs relies on, in our view, speaks

more to the substance of his sentence and gives us little comfort that he would be less likely to reoffend were we to release him.

¶ 68 We grant Suggs's petition for rehearing and impose a seven-year sentence for the Class 2 offense of robbery. We deny Suggs's motion for an appeal bond at this time. The State has indicated its intent to file a petition for leave to appeal. Nothing in this order prevents Suggs from repeating his request for an appeal bond in the supreme court.

¶ 69 Affirmed as modified.

2020 IL App (1st) 182538-U

No. 1-18-2538

Order filed November 25, 2020

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 17 CR 14620
	)	
ANDREW BINION,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse defendant's conviction for possession of a stolen motor vehicle where the trial court abused its discretion by allowing a witness to testify about the violent circumstances surrounding his vehicle being stolen.

¶ 2 Following a jury trial, defendant Andrew Binion was convicted of possession of a stolen motor vehicle and sentenced to 16 years' imprisonment as a Class X offender based on his criminal background. On appeal, defendant contends that the trial court: (1) erred by allowing a witness to

testify about an earlier armed vehicular hijacking; (2) erred in sentencing him as a Class X offender; and (3) alternatively, sentenced him excessively. For the reasons that follow, we reverse defendant's conviction.

¶ 3 I. BACKGROUND

¶ 4 A. Pretrial

¶ 5 In the early morning hours of September 27, 2017, three unknown individuals robbed Darnell Veal's friend at gunpoint and then one unknown individual carjacked Veal of his blue Hyundai at gunpoint. Some 20 hours later, the police arrested defendant after he was found driving Veal's vehicle. The State accordingly charged defendant with one count of possession of a stolen motor vehicle. Prior to trial, defendant filed a motion *in limine*, in part, seeking to prevent the State from eliciting any testimony about the earlier armed vehicular hijacking. Defendant argued that the incident was not relevant to his case, and because of the violent nature of the offense, there was a serious risk of unfairly prejudicing him by allowing the jury to hear about the incident.

¶ 6 In ruling on defendant's motion, the trial court initially highlighted the evidence the State expected to show at trial. The court stated that, after the police attempted to pull over defendant because of a license plate issue and possibly inoperative headlights, he attempted to flee, crashed the vehicle and then attempted to run away. The court observed that the earlier vehicular hijacking helped show defendant's knowledge and state of mind upon being pulled over by the police and helped explain why he did not want to be caught inside the vehicle. In response to defense counsel's contention that the State was attempting to improperly elicit proof of other-crimes evidence, the court rejected the argument and noted that the State would not be eliciting testimony that defendant was the offender in the earlier vehicular hijacking. Indeed, the court pointed out

that it had already barred the State from using video evidence that would have shown the hijacking, in part, because the video did not clearly show the offender's face.

¶ 7 Additionally, defense counsel asked the trial court if she could ask the officers if defendant had ever been arrested for the earlier offense. The court informed her that she could elicit such testimony, but warned her that she could open the door to further testimony from the State about the offense. Given that the State was not attempting to show defendant was the armed carjacker and testimony about the carjacking would help prove an element of the charged offense, the court concluded that the evidence was "more probative than prejudicial." Consequently, the court denied defendant's motion *in limine* as it related to testimony about the vehicular hijacking.

¶ 8 B. Trial

¶ 9 The case proceeded to a jury trial, where the State's evidence showed that, around 1 a.m. on September 27, 2017, Darnell Veal was sitting inside his blue Hyundai at a gas station located at the intersection of South Wentworth Avenue and West 127th Street in Chicago. While there, Veal observed three unknown individuals, including one holding a firearm, rob his friend, Mack Harris, who was leaving the gas station store. Because it was dark outside, Veal could not see the offenders' faces. Shortly after, an unknown individual came up to Veal's vehicle, told him to get out and fired a gunshot over the vehicle's hood in Veal's direction. Veal quickly exited and jumped on the ground. The armed individual jumped into Veal's car and drove off without his permission. The other individuals who robbed Mack also left the scene. Veal observed Mack "run[] for his life" and then, Veal called the police. When officers arrived at the gas station, Veal told them what happened. The officers showed him photographs of individuals, but because he did not get a good look at the offenders' faces, he could not identify anyone.

¶ 10 At around 10 p.m. that night, approximately 20 hours after the vehicular hijacking, Chicago police officers in an unmarked vehicle observed a blue Hyundai driving without its headlights on in the vicinity of East Marquette Road and South Rhodes Avenue in Chicago. The officers made a U-turn, began to follow the Hyundai and noticed that the vehicle had a temporary Illinois license plate. As the Hyundai began to accelerate, one of the officers ran the license plate through a database and learned that it was expired. This caused the officers to activate their lights and sirens, but the Hyundai accelerated even faster. The vehicle made a left-hand turn down the wrong way of a one-way street and immediately crashed into a parked car. Defendant, who had been driving the vehicle, exited the car and ran away. While running, he took off a sweatshirt he was wearing and tossed it down on the ground. Shortly thereafter, officers arrested him. Two other occupants of the Hyundai were detained at the scene of the crash. Afterward, an officer searched the vehicle and observed a permanent license plate inside. Both the permanent license plate and the temporary license plate were registered to the Hyundai. The police did not recover any weapons on defendant or in the vehicle. After defendant was taken into custody, an officer informed him of his *Miranda* rights, but defendant did not want to speak. Later, when an officer transported defendant to be fingerprinted, defendant asked the officer, "Are you the officer I dusted[?]," which the officer understood to mean escaped from.

¶ 11 Upon being reunited with his vehicle, Veal noticed that it was heavily damaged and his license plate had been removed. At trial, the State showed Veal a photograph of defendant, and Veal asserted that he did not know defendant and never gave him permission to drive his vehicle.

¶ 12 Following the State's case, the defense did not present any witnesses. Thereafter, the jury found defendant guilty of possession of a stolen motor vehicle.

¶ 13 C. Posttrial and Sentencing

¶ 14 Defendant subsequently filed a motion for new trial, arguing, *inter alia*, that the trial court erred in allowing Veal to testify about the armed vehicular hijacking. The court, however, denied the motion in its entirety, and the case proceeded to sentencing.

¶ 15 Defendant's presentence investigation report revealed that he was born on August 28, 1986, and had several prior offenses, including a 2004 conviction for delivery of a controlled substance (cocaine), which he committed in December 2003 as a 17-year-old, a 2006 conviction for second-degree murder, which he committed in December 2004 as an 18-year-old, and a 2016 conviction for possession of cannabis.[1] Additionally, the report revealed that defendant had been charged with possession of a counterfeit credit card while out on bond in the present case.

¶ 16 Prior to defendant's sentencing hearing, he pled guilty to possession of a counterfeit credit card, a Class 3 offense. At his sentencing hearing, the State highlighted defendant's criminal background, in particular describing the events that led to his second-degree murder conviction. Meanwhile, defense counsel acknowledged defendant's criminal history, but remarked that when he committed second-degree murder, he was only 18 years old. Counsel asserted that, while he was technically not a juvenile, he was nevertheless "a juvenile in mindset." Counsel also observed the difficulties defendant had faced in life, including being diagnosed with attention deficit hyperactivity disorder and bipolar disorder, as well as being enrolled in special education classes in school.

[1] The record is inconsistent in labeling defendant's 2004 conviction. His presentence investigation report actually indicated that he was convicted of possession of a controlled substance (cocaine) with intent to deliver. In an early pretrial court appearance, the State noted the conviction was for "possession of a controlled substance case," but during sentencing, the State remarked that it was for "delivery of a controlled substance." A supplemental record included in the record on appeal appears to show that the conviction resulted from a one-count information that charged him with possession of a controlled substance (cocaine) with intent to deliver. However, on appeal, both parties refer to this conviction as one for delivery of a controlled substance, and we will do the same.

A70

¶ 17 Following the parties' arguments, the trial court sentenced defendant to 2 years' imprisonment for possession of a counterfeit credit card. In regard to the instant case, the court asserted that, because of defendant's criminal background, he had to be sentenced as a Class X offender. As a result, the court sentenced him to 16 years' imprisonment for possession of a stolen motor vehicle and ordered the sentence to run consecutively to his sentence for possession of a counterfeit credit card. Defendant moved the court to reconsider its sentence, arguing that the State failed to prove his "eligibility for enhanced penalty or extended term," but the court denied the motion. Defendant subsequently appealed.

¶ 18 II. ANALYSIS

¶ 19 A. Vehicular Hijacking Testimony

¶ 20 Defendant first contends that the trial court erred by allowing Darnell Veal to testify about the armed vehicular hijacking that occurred approximately 20 hours before he was arrested. Defendant argues that Veal's testimony was not relevant and because the testimony created the inference that he was involved in the earlier crime, Veal's testimony was highly prejudicial.

¶ 21 In ruling whether evidence is admissible, the first step the trial court must take is determining whether the evidence is relevant. Ill. R. Evid. 402 (eff. Jan. 1, 2011). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011). Evidence that is not relevant is not admissible, and generally, any evidence that is relevant is admissible. Ill. R. Evid. 402 (eff. Jan. 1, 2011). An exception to the general rule that relevant evidence is admissible exists where the probative value of the relevant evidence is substantially outweighed by the danger of unfair prejudice. Ill. R. Evid. 403 (eff. Jan. 1, 2011). The trial court has broad discretion in deciding whether to allow evidence into a trial.

People v. Pikes, 2013 IL 115171, ¶ 12. As such, the court's decision will not be reversed unless the court has abused its discretion (*id.*), which occurs only where its ruling was unreasonable or arbitrary such that no reasonable person would adopt the same view. *People v. Lovejoy*, 235 Ill. 2d 97, 125 (2009).

¶ 22 In order to prove defendant guilty of possession of a stolen motor vehicle, the State was required to show he (1) possessed a vehicle (2) that he was not entitled to possess and (3) knew the vehicle was stolen. *People v. Cox*, 195 Ill. 2d 378, 391 (2001). The undisputed evidence in this case showed that defendant was the driver of the blue Hyundai and that he was not entitled to possess the vehicle. As such, the only element in dispute at trial was whether defendant knew the vehicle was stolen. In proving this element, the State did not need to show defendant's knowledge using direct evidence. *People v. Frazier*, 2016 IL App (1st) 140911, ¶ 23. Rather, his knowledge could be proven through "surrounding facts and circumstances, which would lead a reasonable person to believe that the property was stolen" (*id.*; see also 625 ILCS 5/4-103(a)(1)(A) (West 2016)) or his "exclusive unexplained possession over the stolen *** vehicle." 625 ILCS 5/4-103(a)(1)(B) (West 2016); see also *People v. Jacobs*, 2016 IL App (1st) 133881, ¶ 53.

¶ 23 In this case, the trial court found the testimony of the earlier armed vehicular hijacking relevant to prove defendant's knowledge that the vehicle was stolen. But the only aspect of Veal's testimony about his vehicle being stolen that tended to prove defendant knew it was stolen was the fact that it was stolen 20 hours before defendant was found driving it. A jury could reasonably infer from this short timeframe that defendant, however he obtained the vehicle, must have done so knowing the vehicle was not acquired by legitimate means. However, merely because this aspect of Veal's testimony was relevant did not automatically transform the entire narrative about *how* his vehicle was stolen into relevant evidence. Nothing about Veal's vehicle being taken at

A72

gunpoint, including the offender firing a gunshot, or his friend being the victim of an armed robbery beforehand tended to prove that defendant knew the vehicle was stolen. As such, while the fact that Veal's vehicle was stolen only 20 hours before defendant was found driving it was relevant, the violent details surrounding it being stolen were not. Thus, on this basis, Veal's testimony about the violent nature of his vehicle being stolen should have been deemed inadmissible. See Ill. R. Evid. 402 (eff. Jan. 1, 2011) ("Evidence which is not relevant is not admissible.").

¶ 24 But even if the violent nature of Veal's vehicle being stolen had some relevance, it was clearly and substantially outweighed by the risk of unfair prejudice. Veal's testimony injected an aura of violence into defendant's trial where none should have existed. Additionally, although Veal never identified defendant as one of the offenders, there was an insinuation that defendant was involved in the carjacking or, at the very least, the robbery of Veal's friend. Notably, in Veal's testimony, he stated three people had robbed his friend at gunpoint, and when the police arrested defendant, he was with two other people. While this evidence was not technically other-crimes evidence, as the State never directly implicated defendant in those offenses (see *Pikes*, 2013 IL 115171, ¶ 16), the evidence nevertheless suggested that defendant was involved. See *Jacobs*, 2016 IL App (1st) 133881, ¶¶ 69-70 (where the probative value of evidence is "slight at best" but the risk of unfair prejudice is great because such evidence "create[s] an unmistakable inference that defendant was involved in another crime for which he was not on trial," that evidence is inadmissible).

¶ 25 Instead of describing a violent armed vehicular hijacking and armed robbery, Veal could have simply testified that his vehicle was stolen shortly after midnight on September 27, 2017, without any reference to violent details surrounding it. Given the violent nature of the armed

A73

vehicular hijacking and armed robbery as well as the inference that defendant was involved, the admission of this testimony by Veal posed a severe risk of unfair prejudice to defendant such that he would not be judged solely on his actions related to the possession of a stolen motor vehicle, but also on the earlier acts of violence committed against Veal and his friend. Consequently, the trial court's decision to allow Veal to testify about the violent details surrounding his vehicle being stolen was unreasonable and constituted an abuse of discretion.

¶ 26 However, merely because improper evidence was admitted at trial does not automatically mean reversal is warranted. See *People v. Reid*, 179 Ill. 2d 297, 314 (1997) (evidentiary errors are subject to a harmless-error analysis). Under a harmless-error analysis, the critical question is whether it appears beyond a reasonable doubt that the error did not contribute to the verdict. *People v. Patterson*, 217 Ill. 2d 407, 428 (2005). There are three different approaches to answering this critical question: (1) analyzing the other evidence from the case to determine if that evidence overwhelmingly supported the defendant's conviction; (2) determining whether the improperly admitted evidence was merely cumulative to the other evidence properly admitted at trial; (3) focusing on whether the error contributed to the verdict. *Id.*

¶ 27 Under the first approach, we cannot say the evidence overwhelmingly established defendant's guilt for possession of a stolen motor vehicle. Notably, there was no direct evidence that he knew the vehicle was stolen. Although the jury could infer from defendant's attempt to evade the police, both in the vehicle and on foot, that he knew the vehicle was stolen (see *Frazier*, 2016 IL App (1st) 140911, ¶ 23), his flight did not conclusively establish that fact and there could be other, more innocuous explanations for his actions. See *People v. Horton*, 2019 IL App (1st) 142019-B, ¶ 69 (observing "a troubling reality that young minority men may flee from police to avoid 'the recurring indignity of racial profiling' as opposed to attempting to conceal criminal

activity" (quoting *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (2016))). Moreover, while the jury could infer from defendant's failure to provide the police an explanation for being in possession of a recently stolen motor vehicle that he knew the vehicle was stolen (see *Jacobs*, 2016 IL App (1st) 133881, ¶ 53), that too does not conclusively establish this fact. As such, defendant's flight, his failure to provide an explanation and the recency of Veal's vehicle being stolen did not overwhelmingly demonstrate his guilt. Under the second approach, Veal's testimony about the violent nature of his vehicle being stolen in addition to his testimony about his friend being the victim of an armed robbery was not cumulative to any other evidence properly admitted at trial. And under the third approach, we believe there was a real risk that defendant's guilt for possession of a stolen motor vehicle was, in part, based on the jury's belief that he was also involved in one or two violent acts some 20 hours earlier. Consequently, we are not persuaded beyond a reasonable doubt that the erroneous admission of Veal's testimony did not contribute to his verdict. Therefore, the trial court's error was not harmless.

¶ 28 Although we have concluded that defendant's conviction for possession of a stolen motor vehicle cannot stand, we must determine whether to reverse it outright or remand the matter for a new trial. Under the double jeopardy clause of the United States Constitution's fifth amendment, no person may "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., amend. V. Similar provisions also exist in the Illinois Constitution (see Ill. Const. 1970, art. I, § 10) and in our statutes. See 720 ILCS 5/3-4(a) (West 2016). "The cornerstone of the double jeopardy clause is 'that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found

guilty.' " *People v. Williams*, 188 Ill. 2d 293, 307 (1999) (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)).

¶ 29 The double jeopardy clause forbids the retrial of a defendant to afford the State another opportunity to present evidence it failed to present in the first trial, but it "does not preclude retrial when a conviction has been overturned because of an error in the trial proceedings." *People v. Drake*, 2019 IL 123734, ¶ 20. If the evidence presented at the first trial was insufficient to support the defendant's conviction, he cannot be retried. *Id.* However, retrial is the proper remedy if the evidence, including the improperly admitted evidence, presented at the first trial was sufficient to support the defendant's conviction. *Id.* ¶ 21. In considering the sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

¶ 30 In this case, as noted, the only element of possession of a stolen motor vehicle in dispute was whether defendant knew the vehicle was stolen. And while there was not overwhelming evidence defendant knew the vehicle was stolen, there was nevertheless sufficient evidence from which the jury could infer that he knew it was stolen. As noted, defendant attempted to evade the police, both in the vehicle and then on foot, and discarded his sweatshirt while running away. See *People v. Whitfield*, 214 Ill. App. 3d 446, 454 (1991) ("Sufficient proof of intent to possess a stolen motor vehicle can be found in witness testimony that defendant drove a stolen vehicle down an alley, crashed it and then fled."). Moreover, defendant provided the police no explanation as to why he had exclusive possession of a recently stolen vehicle. See *People v. Steading*, 308 Ill. App. 3d 934, 939 (1999) (observing that the evidence clearly showed defendant knew the vehicle he was driving was stolen because he "offered no evidence *** explaining why he had possession of

a stolen truck"). When this evidence is viewed in the light most favorable to the State, a rational trier of fact could have found that the State proved the essential elements of possession of a stolen motor vehicle, in particular that defendant knew the vehicle was stolen, beyond a reasonable doubt. Consequently, although we reverse defendant's conviction for the offense, we remand the matter for a new trial consistent with the evidentiary exclusions set forth herein. See *Drake*, 2019 IL 123734, ¶ 21.

¶ 31 Despite this result, we will still address defendant's contention of error concerning him being sentenced as a Class X offender because if he is found guilty upon remand, his eligibility for a Class X sentence would once again be an issue. See *People v. Jones*, 105 Ill. 2d 342, 353 (1985) (where the reviewing court reverses a conviction based on one issue, it should address any other issues that are likely to recur upon remand).

¶ 32 B. Sentencing as a Class X Offender

¶ 33 Defendant also contends that the trial court improperly sentenced him as a Class X offender where one of his two potentially qualifying prior convictions occurred when he was 17 years old and, under current law, would not render him eligible for Class X sentencing.

¶ 34 Because defendant's conviction for possession of a stolen motor vehicle was a Class 2 felony (625 ILCS 5/4-103(a)(1), (b) (West 2016)) and he was more than 21 years old when he committed the offense, he became subject to mandatory Class X sentencing if his criminal background was severe enough. 730 ILCS 5/5-4.5-95(b) (West 2016). To have the requisite criminal background to be subject to a mandatory Class X sentence, defendant must have been convicted twice, in state or federal court, "of an offense that contains the same elements as an offense now (the date the Class 1 or Class 2 felony was committed) classified in Illinois as a Class 2 or greater Class felony." *Id.* We note that the trial court did not expressly state which of

defendant's prior convictions were the predicate offenses to him being a Class X offender. But both parties agree that the court used his 2004 conviction for delivery of a controlled substance and 2006 conviction for second-degree murder, and both parties agree these offenses were Class 2 felonies or greater when defendant committed them.

¶ 35 Defendant, however, argues that, because he was 17 years old at the time he committed delivery of a controlled substance, an amendment to the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/5-120 (West 2016)) has resulted in his offense not *now* being classified as a Class 2 or greater felony. According to defendant, because of the amendment, had he committed delivery of a controlled substance as a 17-year-old on September 27, 2017—the date he committed possession of a stolen motor vehicle—he would have been tried and convicted as a juvenile, not as an adult. Whether defendant's 2004 conviction for delivery of a controlled substance constitutes a qualifying offense for Class X sentencing involves a matter of statutory construction, which, as a question of law, we review *de novo*. *People v. Baskerville*, 2012 IL 111056, ¶ 18.

¶ 36 As noted, when defendant committed the offense of delivery of a controlled substance in December 2003, he was 17 years old. At that time, the Juvenile Court Act provided that juvenile courts had exclusive jurisdiction over offenses committed by individuals under 17 years old with some exceptions not relevant here. 705 ILCS 405/5-120 (West 2002). Thus, because defendant was 17 years old at the time he committed the offense, he was excluded from juvenile court, and tried and convicted in adult court. However, in 2013, our legislature amended the Juvenile Court Act to provide exclusive jurisdiction to juvenile courts for offenders under 18 years old with some exceptions not relevant here. Pub. Act 98-61 (eff. Jan. 1, 2014) (amending 705 ILCS 405/5-120). Thus, had defendant committed delivery of a controlled substance after the amendment to section

5-120 of the Juvenile Court Act, he would have been subject to proceedings in juvenile court, not proceedings in adult court. And had defendant been adjudicated delinquent in juvenile court, that would not have been considered a felony conviction. *People v. Taylor*, 221 Ill. 2d 157, 182 (2006). As such, the overarching question is whether to apply the amendment to section 5-120 of the Juvenile Court Act retroactively or prospectively for purposes of Class X sentencing.

¶ 37 Recently, in *People v. Miles*, 2020 IL App (1st) 180736, this court addressed a nearly identical issue to the one defendant raises, though it was based not only on the age of the offender but also the type of offense in relation to the Juvenile Court Act.[2] In *Miles*, the defendant was convicted of burglary and sentenced as a Class X offender based, in part, on a conviction for aggravated vehicular hijacking with a firearm and armed robbery that occurred in 2005 when he was 15 years old. *Id.* ¶¶ 1, 3. On appeal, this court held that, in light of the amendments to not only section 5-120 of the Juvenile Court Act, but also section 5-130 of the Juvenile Court Act, the defendant could not be sentenced as a Class X offender. *Id.* ¶¶ 6-7, 11.[3] The court reasoned that the plain language of section 5-4.5-95(b) of the Unified Code of Corrections (Code), which provided that a qualifying prior conviction for Class X sentencing must be considered "an offense now *** classified in Illinois as a Class 2 or greater Class felony," mandated such a finding because, had the defendant committed the aggravated vehicular hijacking and armed robbery as a 15-year-old on the date he committed his burglary, those offenses "would have been resolved with delinquency proceedings in juvenile court rather than in criminal proceedings." *Id.* As such, the

[2] In September 2020, our supreme court granted the State's petition for leave to appeal in *Miles*, 2020 IL App (1st) 180736, *appeal allowed*, No. 126047 (Sept. 30, 2020). However, a month later, the State moved to dismiss the appeal and vacate the appellate court decision based upon the defendant's death. As of November 20, 2020, our supreme court has not ruled on the State's motion.

[3] Section 5-130 of the Juvenile Court Act provides the offenses that are excluded from being prosecuted in juvenile court. 705 ILCS 405/5-130 (West 2016).

defendant's conduct would not have been classified as a Class 2 or greater class felony in Illinois. *Id.* The court further noted that section 5-4.5-95(b) of the Code utilized the word "conviction," and based on our supreme court's decision in *Taylor*, a juvenile adjudication would not be considered a felony conviction. *Id.* ¶¶ 15-16 (citing *Taylor*, 221 Ill. 2d at 176).

¶ 38 We agree with *Miles*'s plain language reading of section 5-4.5-95(b) of the Code and find the same result warranted in this case. As noted, when defendant committed delivery of a controlled substance, he was tried in adult court because he was 17 years old and section 5-120 of the Juvenile Court Act only provided for exclusive jurisdiction over offenses committed by individuals under 17 years old with some exceptions not relevant here. 705 ILCS 405/5-120 (West 2002). But because of the amendment to section 5-120 of the Juvenile Court Act in 2013, had defendant committed that same offense as a 17-year-old on September 27, 2017, his case would have been resolved with delinquency proceedings in juvenile court rather than with proceedings in adult court. Consequently, he would have obtained a juvenile adjudication, not a felony conviction, and is therefore ineligible for mandatory Class X sentencing. See 730 ILCS 5/5-4.5-95(b) (West 2016); *Miles*, 2020 IL App (1st) 180736, ¶¶ 15-16 (citing *Taylor*, 221 Ill. 2d at 176).

¶ 39 Although the State acknowledges *Miles*'s holding and concedes that, if followed, it would render defendant ineligible for mandatory Class X sentencing, the State asks us to reconsider the decision. In doing so, the State raises similar arguments that it did in *Miles*, all of which were rejected by this court. And we see no reason to deviate from the well-reasoned decision of *Miles*. We understand the trial court did not have the benefit of *Miles* when it sentenced defendant, but he is nonetheless ineligible for mandatory Class X sentencing, and if he is found guilty upon retrial, he must be sentenced as a Class 2 offender. See *Miles*, 2020 IL App (1st) 180736, ¶ 23.

¶ 40 III. CONCLUSION

¶ 41 For the foregoing reasons, we reverse defendant's conviction for possession of a stolen motor vehicle and remand for a new trial.

¶ 42 Reversed and remanded.

2020 IL App (1st) 172835-U

THIRD DIVISION
Order filed June 17, 2020
Modified upon denial of rehearing August 5, 2020

No. 1-17-2835

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 17 CR 4409
	)	
LARRY FORD,	)	
	)	Honorable
Defendant-Appellant.	)	Vincent M. Gaughan,
	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for aggravated battery of a peace officer based on defendant's spitting on a Chicago police officer affirmed where there was sufficient evidence to support the jury's verdict. Defendant's sentence vacated where the trial court erred in sentencing defendant as a Class X offender based on convictions for offenses committed as a juvenile.

¶ 2 After a jury trial, defendant, Larry Ford, was found guilty of aggravated battery of a peace officer. The trial court found defendant eligible to be sentenced as a Class X offender based on

prior Class 1 and Class 2 felony convictions, and sentenced defendant to seven years' imprisonment in the Illinois Department of Corrections. Defendant now appeals his conviction and sentence.

¶ 3 The record shows that defendant was charged by information with three counts of aggravated battery of Chicago police officer Radoslaw Wieczorek. At trial, Officer Wieczorek testified that on March 10, 2017, he was on duty in a fully marked patrol vehicle and was working with Officers Ulloa and Kaminska. Officer Wieczorek was in full Chicago police uniform, including a bulletproof vest. Around 12:30 a.m., Officer Wieczorek was in the area of 2018 North Pulaski, where he observed an unmarked police vehicle, several police officers, and a man, who he identified in court as defendant. Officer Wieczorek stepped out of his patrol vehicle, and proceeded to where the officers and defendant were standing. Defendant was "screaming, saying all kinds of stuff." Officer Wieczorek stated that when he first arrived, defendant was "kind of stepping side to side saying random stuff," and after that, defendant was "basically acting violent."

¶ 4 At some point, there was a decision made to place defendant into custody. At that point, two other officers placed defendant against the car parked on Pulaski. Defendant started "flailing his arms and jerking his body *** trying to get away from them." Officer Wieczorek testified that it was at this point when defendant "turned his head toward" Officer Wieczorek, "hocked up his saliva," and "ejected it out of his mouth." Defendant's saliva landed on Officer Wieczorek's chest. Defendant spit at Officer Wieczorek "at least twice." Officer Wieczorek was "approximately two to three feet" from, and "directly behind," defendant when defendant spit on Officer Wieczorek. Officer Wieczorek testified that it was dark outside, but the street was illuminated.

¶ 5 Sergeant Stephen Keenan of the Chicago Police Department testified that around 12:30 a.m. on March 10, 2017, he was dressed in full uniform and in a marked squad car driving

southbound on Pulaski between Dickens and Armitage. At that time, he saw a man, who he identified in court as defendant, walking northbound between the street and the sidewalk along the parked cars. Sergeant Keenan heard defendant "yelling and screaming" at three people who were walking northbound on the sidewalk. Defendant was yelling so loudly that Officer Keenan could hear him from at least half a block away. Sergeant Keenan approached defendant and the group and asked if everybody was okay. Sergeant Keenan stated that his intention in approaching the scene was to "find out what was going on," and to "find out where [defendant] lived and get him home or get him some kind of help." After no one responded and Sergeant Keenan was preparing to drive away, defendant slapped his hand down on the hood of Sergeant Keenan's vehicle. Sergeant Keenan called for backup, then exited his car to speak with defendant and find out what was going on. Sergeant Keenan described defendant as "semi-agitated" and "semi-confrontational," and stated that he "was not giving straight answers." Sergeant Keenan tried to identify defendant and find out where he lived, but defendant did not give him that information.

¶ 6 Sergeant Keenan testified that, at that point, other officers arrived, and they continued to try to determine what was going on and if defendant was in trouble. After receiving no information from defendant, Sergeant Keenan tried to find the people at whom defendant had been yelling, to "see if they were friends of his." Sergeant Keenan located Ismael Villasenor, and his daughter Jasmine, in an apartment of a nearby building. Ismael and Jasmine told Sergeant Keenan that they did not know defendant, and that he had been threatening Jasmine. They agreed to sign complaints against defendant, and a decision was made to take defendant into custody.

¶ 7 Sergeant Keenan testified that he then returned to defendant's location, and other officers began attempting to handcuff defendant. Defendant became agitated and started "resisting his body around a little bit" to avoid having his hands cuffed. A few seconds later, after he was handcuffed,

defendant "turned toward the direction of some of the assisting officers and spat directly at *** Officer Wieczorek." Sergeant Keenan saw defendant spit, and the spit landed on Officer Wieczorek's chest. Defendant spit at Officer Wieczorek "multiple times, *** at least two to three." Defendant then became more agitated and "stated loudly that he had HIV." Defendant was then transported to the station in a squadrol.

¶ 8 Chicago police officer Patrick Kaminska testified that on March 10, 2017, he was working with Officers Ulloa and Wieczorek. Officer Kaminska testified that they were in the third or fourth car that arrived at the scene in response to Sergeant Keenan's call for assistance. When they arrived, officers were attempting to speak with defendant and get identifying information from him. Defendant told the officers that he "lived in the universe." After asking defendant several times where he lived, the officers learned that an assault had taken place earlier and that an officer was in the process of getting a complaint signed against defendant. The officers then decided to place defendant in custody and attempted to handcuff him. Defendant became "combative," was "flailing his arms" and was not "responding to verbal direction." As this was occurring, Officer Kaminska saw defendant spit on Officer Wieczorek's chest twice.

¶ 9 After defendant spit on Officer Wieczorek, the officers took defendant into full custody in handcuffs and made sure that he was facing away from the officers and down toward the ground. As Officer Kaminska stood to the right of defendant, he heard defendant state that defendant had HIV.

¶ 10 The video footage from Officer Kaminska's police vehicle was published to the court and admitted into evidence. Officer Kaminska identified some interaction between the officers and defendant, before the video ended prior to defendant spitting on Officer Wieczorek. Officer Kaminska testified that he had manually turned off the video camera in his vehicle, because he

A005

determined that the incident was over, and because the camera was aimed at the rear of another vehicle.

¶ 11 Ismael Villasenor testified that on March 10, 2017, around 12:30 a.m., he was walking north on Pulaski toward a house on that street, with his 21-year-old daughter, Jasmine Villasenor, and his friend, Salvador Gomez. They encountered defendant, who was standing about 20 feet away from them at the corner of Armitage and Pulaski. Defendant was screaming, calling Jasmine a "b***" and "a lot of other different names." Ismael, thinking defendant "was drunk or on drugs," positioned his daughter between himself and his friend as they continued walking, and tried to ignore defendant.

¶ 12 Ismael testified that defendant then began walking toward them, "calling [them] names" and telling Ismael he was "going to kick [his] a***." Ismael told his daughter to go inside. At this point, Ismael saw police officers arrive, and saw defendant slam his hand on the hood of a police car. Ismael then saw other officers arrive on the scene, and he went inside the house. About ten minutes later, an officer knocked on the door and asked Ismael what had happened. Ismael told the officer what happened, and signed complaints against defendant.

¶ 13 The State rested, and defendant's motion for a directed verdict was denied. Defendant rested without offering any evidence or testifying.

¶ 14 Following closing arguments, the jury returned a verdict finding defendant guilty of three counts of aggravated battery of a peace officer.

¶ 15 At sentencing, the trial court found defendant eligible for mandatory Class X sentencing based on a previous 2001 Class 1 conviction for delivery of a controlled substance near a school and a 2002 Class 2 conviction for possession of a controlled substance with intent to deliver.

Defendant was 16 years old at the time of the 2001 offense, and 17 years old at the time of the 2002 offense.

¶ 16 In aggravation, the State asked the court for an "appropriate sentence," "in light of [defendant's] background," which included his 2001 and 2002 convictions, as well as a conviction for a "Class 4 drug offense" in 2003. The State noted that defendant was initially sentenced to probation for the 2001 offense, but that he violated that probation and was resentenced to Cook County boot camp. Defendant was also sentenced to boot camp for the 2002 offense, and to one year of imprisonment for the 2003 offense.

¶ 17 In mitigation, defense counsel asked for the minimum sentence. Counsel noted that defendant posted bond and had come to court timely on each court date. Defense counsel argued that defendant's actions did not cause serious harm, and that it had been a significant length of time since his last felony conviction. Counsel further asserted that defendant worked in the community.

¶ 18 Defendant spoke in allocution, denying that he spit on anyone and stating that the testifying officers lied. Defendant further stated that he had not been "in trouble" for 14 years, that he provided care for his daughter with medical issues, and that his girlfriend and mother of his child was "going to be all alone."

¶ 19 The court noted that the applicable Class X sentencing range was a "minimum of six years to a maximum of 30 years" of imprisonment. The court stated that it considered the aggravating and mitigating factors, explicitly noting that it was "impressed" by defendant taking care of his daughter. The trial court sentenced defendant to seven years' imprisonment. The court admonished defendant of his appellate rights, and defendant's oral motion to reconsider his sentence was denied.

¶ 20 In this court, defendant argues that the State failed to prove him guilty beyond a reasonable doubt, that the trial court improperly imposed mandatory Class X sentencing, and that his sentence is excessive and violates the proportionate penalties clause of the Illinois Constitution as applied to him. We consider defendant's sufficiency of the evidence challenge first.

¶ 21 When a defendant claims that the evidence presented at trial is insufficient to sustain his conviction, we look at all the evidence in a light most favorable to the State and ask if any rational trier of fact could find the elements of the charged offense to be proved beyond a reasonable doubt. *People v. Belknap*, 2014 IL 117094, ¶ 67. The trier of fact has the responsibility to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *People v. Brown*, 2013 IL 114196, ¶ 48. Accordingly, this court will not retry the evidence or substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or credibility of witnesses. *Id.* Under this standard, all reasonable inferences from the evidence must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. A reviewing court will not reverse a criminal conviction unless the evidence is "unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 22 To prove defendant guilty of the aggravated battery of Officer Wieczorek, the State was required to prove, beyond a reasonable doubt, that defendant knowingly and without legal justification made physical contact of an insulting or provoking nature with Officer Wieczorek, whom he knew to be a peace officer (i) who was performing his official duties; (ii) who was battered to prevent performance of his official duties; or (iii) who was battered in retaliation for performing his official duties. 720 ILCS 5/12-3(a)(2) (West 2016); 720 ILCS 5/12-3.05(d)(4)(i)(ii)(iii) (West 2016).

¶ 23 On appeal, defendant contends that the State did not provide sufficient evidence to sustain his conviction. He does not dispute that he was aware that Officer Wieczorek was a police officer performing his official duties on the day of the offense; rather, he argues that the evidence did not establish beyond a reasonable doubt that he knowingly made physical contact of an insulting or provoking nature with Officer Wieczorek. Defendant specifically argues that the evidence failed to establish that any contact made with Officer Wieczorek was done "knowingly," where the evidence "does not support a finding that [defendant] knew that [Officer] Wieczorek – or any other officer – was directly behind him or that his spit would make contact with [Officer] Wieczorek a yard away." Defendant also contends that the evidence at trial failed to prove that the contact made with Officer Wieczorek was "insulting or provoking," where Officer Wieczorek did not testify to any "reaction" from which the trier of fact could have inferred that the officer was insulted or provoked.

¶ 24 A person acts knowingly when he is "consciously aware" of the nature of his conduct and that his conduct is practically certain to cause a particular result. 720 ILCS 5/4-5(a), (b) (West 2016). A person's knowledge is generally established by circumstantial evidence rather than by direct proof. *People v. Castillo*, 2018 IL App (1st) 153147, ¶ 26; see also *People v. Lattimore*, 2011 IL App (1st) 093238, ¶ 44 ("Intent may be inferred (1) from the defendant's conduct surrounding the act and (2) from the act itself.").

¶ 25 Courts have repeatedly found that knowingly or intentionally spitting on a police officer is physical contact of an insulting or provoking nature amounting to battery. See *People v. Wrencher*, 2011 IL App (4th) 080619, ¶ 55 ("For hundreds of years, the common law has regarded deliberate spitting on someone as a battery."); *People v. Peck*, 260 Ill. App. 3d 812, 814 (1994) ("Since the development of early common law, spitting has been recognized as an act sufficient to support a

battery conviction."). A victim does not have to testify that he or she was provoked; the trier of fact can make that inference from the victim's reaction at the time (*People v. Dunker,* 217 Ill. App. 3d 410, 415 (1991)), and a "trier of fact may take into account the context in which a defendant's contact occurred to determine whether the touching was insulting or provoking" (*People v. Fultz,* 2012 IL App (2d) 101101, ¶ 49).

¶ 26 In the present case, defendant's intent, and the insulting or provoking nature of defendant's contact, may be inferred from the context and the act itself. Viewing the evidence in the light most favorable to the State, as we must, we find that a rational trier of fact could find beyond a reasonable doubt that defendant knowingly made contact of an insulting or provoking nature with Officer Wieczorek by spitting on him. The testimony established that defendant was agitated, was "screaming" at the officers, and was "acting violent." When the officers attempted to handcuff defendant, defendant became "combative," and was "flailing his arms," attempting to resist their efforts. Defendant then "turned his head toward" Officer Wieczorek, "hocked up his saliva," and "ejected it out of his mouth." Defendant spit on Officer Wieczorek at least twice, and after spitting, defendant "stated loudly that he had HIV."

¶ 27 From this evidence, a rational fact finder could find that defendant knowingly and intentionally made physical contact of an insulting or provoking nature with Officer Wieczorek, proving the elements of aggravated battery beyond a reasonable doubt. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 229 (2009) ("[T]he trier of fact is not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt.").

¶ 28 We are not persuaded by defendant's contention that the lack of testimony regarding Officer Wieczorek's reaction to being spit on requires a finding that the evidence was insufficient

to sustain his conviction. In *People v. Nichols*, 2012 IL App (4th) 110519, ¶ 43, the fourth district appellate court rejected the defendant's argument that the "routine" nature of a correctional officer's reaction after the defendant threw a liquid in his face raised a reasonable doubt of defendant's battery conviction. The court explained that, "as professionally as those corrections officers may handle it in certain circumstances, juries are nevertheless generally permitted to infer the insulting or provoking nature of those obviously repulsive contacts." *Id.* Similarly here, even without specific testimony regarding Officer Wieczorek's reaction, we conclude that the jury could have reasonably inferred from the circumstances surrounding defendant's actions that he knew, and was consciously aware, that spitting at Officer Wieczorek would result in physical contact that was of an insulting or provoking nature. We also note that courts have held that behavior was insulting or provoking in far less extreme or "obviously repulsive" (*id.*) circumstances. See *People v. DeRosario*, 397 Ill. App. 3d 332, 332–34 (2009) (contact was found to be insulting or provoking when the defendant's "right knee touched [the victim's] back through [a] chair, and his left knee touched her hip," because it occurred in the context of a failed relationship and the room was not crowded). Under the evidence presented here, we find the jury's conclusion that defendant made physical contact of an insulting or provoking nature with Officer Wieczorek by spitting on him is a reasonable inference from the evidence.

¶ 29 We are also unpersuaded by defendant's challenges to the lack of photographic or video evidence, as well as the fact that Officer Wieczorek did not "inventory the vest or have any samples collected from it." Defendant cites no authority requiring such evidence. To the contrary, the testimony of a single witness, if it is positive and the witness credible, is sufficient to convict. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). Proof of physical evidence connecting a defendant to a crime has never been required to establish guilt. *Williams*, 182 Ill. 2d at 192; see also *People v.*

Clarke, 391 Ill. App. 3d 596, 610 (2009) ("The lack of physical evidence in a case does not raise a reasonable doubt where an eyewitness has positively identified the defendant as the perpetrator of the crime."). Here, three officers testified that they saw defendant spit on Officer Wieczorek, and that the spit landed on Officer Wieczorek's chest. It was the responsibility of the trier of fact to evaluate the credibility of those witnesses and to weigh their testimony, and we will not substitute our judgment for that of the jury on such issues. *Brown,* 2013 IL 114196, ¶ 48.

¶ 30 Defendant next contends that the trial court wrongly concluded that mandatory Class X sentencing applied in his case. He argues that his two prior convictions, for offenses committed while he was a minor, are not convictions triggering Class X sentencing. Defendant recognizes that the issue was not raised in the trial court, however, he asks this court to review the merits of his arguments under the plain error doctrine.

¶ 31 Under the plain error doctrine, a reviewing court may excuse a party's procedural default if a clear or obvious error has occurred and either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Staake,* 2017 IL 121755, ¶ 31. A sentence that is not statutorily authorized affects a defendant's substantial rights and is reviewable under the second prong of the plain error doctrine. *People v. Miles,* 2020 IL App (1st) 180736. In particular, this court has repeatedly concluded that plain error allows review of claims that a prior conviction is not a qualifying prior offense for Class X sentencing. See *id.*; *People v. Foreman,* 2019 IL App (3d) 160334, ¶¶ 41, 42. However, before we consider the application of the plain error doctrine, we must first determine whether any error occurred (*People v. Wooden,* 2014 IL App (1st) 130907, ¶ 10), because " 'without error, there can

be no plain error' " (*Wooden*, 2014 IL App (1st) 130907, ¶ 10 (quoting *People v. Smith*, 372 Ill. App. 3d 179, 181 (2007))).

¶ 32 Pursuant to section 5/5-4.5-95(b) of the Unified Code of Corrections, "When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now (the date the Class 1 or Class 2 felony was committed) classified in Illinois as a Class 2 or greater Class felony and those charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender." 730 ILCS 5/5-4.5-95(b) (West 2016).

¶ 33 Defendant contends that he is not eligible for Class X sentencing under the above provision because his convictions, for offenses committed while he was a minor, would have been subject to the exclusive jurisdiction of the juvenile court in 2017. See Pub. Act. 98-61 (eff. Jan. 1, 2014) (amending 705 ILCS 405/5-120 of the Juvenile Court Act to assert jurisdiction over minors under 18). Thus, had such offenses been committed in 2017, they would have been subject to delinquency adjudications, and not Class 1 and Class 2 felony convictions.

¶ 34 This court recently addressed a virtually identical argument in *Miles*, 2020 IL App (1st) 180736. The defendant in *Miles* received a Class X sentence based, in part, on a 2006 conviction for aggravated vehicular hijacking with a firearm and armed robbery, an offense committed while the defendant was a minor. *Id.*, ¶ 3. This court found the defendant's 2006 conviction to be an invalid predicate conviction for Class X sentencing because, had it been committed on the date of the present offense, in 2016, it "would have been resolved with delinquency proceedings in juvenile court rather than in criminal proceedings." *Id.*, ¶ 11. The court reasoned that the plain language in section 5-4.5-95(b)—"an offense now *** classified in Illinois as a Class 2 or greater

Class felony"—required this result because the defendant's 2006 offense would not have been so classified had the defendant committed it in 2016. *Id.*

¶ 35 Similarly here, defendant's 2001 Class 1 felony conviction, and his 2002 Class 2 felony conviction, for offenses committed when defendant was, respectively, 16 and 17 years old, are not "offense[s] now *** classified in Illinois as *** Class 2 or greater Class felon[ies]." Rather, had these offenses been committed under the laws in effect at the time of the present offense, they would have been resolved through delinquency proceedings. See *id.*, ¶¶ 11, 22. Because defendant's offenses would have led to juvenile adjudications rather than felony convictions, neither conviction is a qualifying prior offense for Class X sentencing purposes under the plain language of the Class X statute. *Id.*

¶ 36 Having so found, we also conclude that the Class X sentence imposed on defendant, which was not statutorily authorized and which affected defendant's substantial rights, resulted in plain error. See *id.* (holding that plain error applied where defendant was improperly sentenced under Class X sentencing); *Foreman*, 2019 IL App (3d) 160334, ¶¶ 41, 42 (same). In light of our conclusion, we need not reach defendant's alternative arguments—that mandatory Class X sentencing does not apply because he was sentenced for both prior convictions on the same date, that his sentence is excessive, and that his sentence violates the proportionate penalties clause of the Illinois Constitution as applied to him.

¶ 37 In a petition for rehearing filed after this case's initial filing, the Appellate Defender informed this court that, as of February 5, 2020, defendant satisfied his seven-year term of imprisonment, and was released on a three-year period of mandatory supervised release. Defendant requests that, rather than remanding this matter to the circuit court for resentencing as a Class 2 offender, this court enter the maximum Class 2 sentence of seven years, which he has already

served, and modify his mandatory supervised release term to the two-year term applicable to Class 2 sentencing. See 730 ILCS 5/5-4.5-35(a) (West 2016); Ill. Sup. Ct. R. 615(b)(3); (b)(4) (allowing this Court to reduce the degree of the offense of which the appellant was convicted, and to reduce the punishment imposed by the trial court).

¶ 38 This court ordered the parties to confer to determine whether they agreed to the requested relief. This court was subsequently informed that the State had "no objection to [this court] exercising its authority under Rules 367 and 615(b)(4) and altering the relief awarded in the Rule 23 order by amending his sentence from a 7 year Class X sentence to a 7 year Class 2 sentence as a remedy for the Appellate Court's ruling that he was not eligible for a Class X sentence," but the State reserved its right to appeal this court's judgment. Accordingly, this court will impose the maximum Class 2 sentence of seven years' imprisonment, followed by a two-year term of mandatory supervised release.

¶ 39 For the foregoing reasons, we affirm defendant's conviction for aggravated battery of a peace officer, and vacate defendant's Class X sentence. Pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) to order the correction of a mittimus without remanding the cause to the trial court (*People v. McCray*, 273 Ill. App. 3d 396, 403 (1995)), we order the clerk of the circuit court to amend defendant's mittimus to reflect a Class 2 sentence of seven years' imprisonment followed by a two-year term of mandatory supervised release.

¶ 40 Affirmed in part and vacated in part; mittimus corrected.

Trial and Sentencing of Youth as Adults in the Illinois Justice System: Transfer Data Report

MARCH 2020

Illinois Juvenile Justice Commission
http://ijjc.illinois.gov/

A96

Table of Contents

Introduction and Methodology

This is the second report prepared by the Illinois Juvenile Justice Commission[1], as required by the Illinois Juvenile Court Act, to provide statewide data on the transfer of youth to adult courts and related court actions to impose adult sentencing provisions on certain youth. It contains data reported for Calendar Year 2017.[2]

Effective January 2016, the Illinois General Assembly significantly scaled back trial of youth as adults in adult criminal courts in Public Act 99-0258.[3] In enacting these provisions, the General Assembly relied on a strong and growing body of research and data indicating that processing and punishing youth like adults harms young people and undermines public safety and community well-being.

As discussed in the Illinois Juvenile Justice Commission's report *Raising the Age of Juvenile Court Jurisdiction*[4] (2013), the indiscriminate trial of youth as adults fails to take into account developmental factors like impulsivity, vulnerability to peer pressure, attraction to risk-taking and underdeveloped decision-making skills. These well-established developmental traits render adolescents less culpable for their behavior. At the same time, developmental immaturity makes young people highly responsive to positive, rehabilitative supports and interventions. National research also indicates that trial of youth as adults does not effectively deter juvenile crime and may in fact produce higher rates of offending and recidivism. In enacting Public Act 99-0258, the General Assembly has taken steps to more closely align Illinois law with this research and data.

In addition to modifying criteria and processes for transferring youth to adult criminal court, the Act also recognizes the need for current and complete statewide data regarding transfers and related court actions. Prior to the legislation, there was no state-wide repository for information regarding the transfer and trial of youth as adults[5], the imposition of adult sentences pursuant to "extended juvenile jurisdiction" provisions (EJJ)[6] or designation of youth as "habitual"[7] or

[1] **The Illinois Juvenile Justice Commission serves as the federally mandated State Advisory Group to the Governor, General Assembly and the Illinois Department of Human Services. See 20 ILCS 505/17a-5.**
[2] **The first annual data report, published in 2018, is available at** http://ijjc.illinois.gov/sites/ijjc.illinois.gov/files/assets/Juvenile%20Transfers%20CY2016%20Report_FINAL.pdf
[3] The Act repeals provisions for the transfer of youth ages 15 and under to adult court, limits other "automatic transfers" and expands judicial discretion in transfer decisions for 16 and 17 year olds, except for those charged with first degree murder, aggravated criminal sexual assault or aggravated battery with a firearm. The statute also establishes factors a judge may take into consideration when sentencing a person under 18, including maturity, presence of a developmental disability, home environment, trauma, prior criminal activity (if any) and potential for rehabilitation. (Public Act 99-0258; effective January 2016.)
[4] http://ijjc.illinois.gov/rta
[5] **750 ILCS 405/5-130 and 750 ILCS 405/5-805**
[6] **750 ILCS 405/5-810**
[7] **750 ILCS 405/5-815**

"violent"[8] juvenile offenders (HJO or VJO status). Each of these mechanisms can trigger adult approaches to the trial and sentencing of youth. To address this information gap, the Act created a data reporting provision which requires Circuit Court Clerks to track and report information twice annually on the filing and disposition of these proceedings. [9] The Act required the Illinois Juvenile Justice Commission to develop "the standards, confidentiality protocols, format, and data depository" for these reports.[10] An explanatory text of the types of motions and proceedings this report covers can be found in Appendix A.

To fulfill this mandate, the Commission and its research partners at the University of Illinois Center for Prevention Research and Development and Loyola University's Center for Criminal Justice Research, Policy and Practice developed standardized data collection forms designed for use by Circuit Court Clerks in collecting and reporting this data. In the initial reporting period, the Commission also sought and benefitted greatly from dialogue and collaboration with the Illinois Association of Court Clerks and the Administrative Office of the Illinois Courts to develop and test data collection forms and mechanisms.

In developing these forms and reporting protocols, practitioners recognized that the statute requires collection of information that no single criminal justice stakeholder – prosecutor, defender, probation department or Circuit Court Clerk, for example – has readily available in all cases. Thus, meeting the statutory mandates has required collaboration among justice system stakeholders and development of new methods for gathering case-level data.

This report reflects the data reported for Calendar Year 2017 and presents that information in three ways:

- The first section provides aggregated, statewide data on all proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and / or Habitual Juvenile Offender provisions.
- The second section provides more detailed information on each of these categories (Excluded Jurisdiction proceedings, motions to transfer, motions for Extended Juvenile Jurisdiction proceedings and motions for Violent Juvenile Offender or Habitual Juvenile Offender designations).
- The third section provides county-level information for those counties reporting proceedings in one or more of these categories.

[8] **750 ILCS 405/5-820**

[9] **See 705 ILCS 405/5-822**

[10] Statewide transfer data will also facilitate Illinois' compliance with the federal Juvenile Justice and Delinquency Prevention Act requirement for states to gather and report juvenile justice / criminal justice data at nine key decision points, including trial of youth as adults.

In reviewing this report, stakeholders should note that, while the statute requires reporting of victim and case disposition information, data reporting has not been complete or consistent enough to include in the reports. Information reported on race and ethnicity was also not detailed or consistent, with large numbers of youth categorized as "other race" or "unknown." Finally, it should be noted that youth may be subject to multiple proceedings and / or charges. Therefore, the number of proceedings or charges listed may exceed the number of youth in some data tables. Where relevant, case information and individual youth information is presented.

Gathering and reporting the required information was complex and challenging for all involved – the research team, Commission staff, Circuit Court Clerks and other state and local partners. However, the diligence and collaboration exhibited by these stakeholders has yielded unprecedented statewide information about youth subject to transfer and trial as adults in Illinois. This information can provide valuable information to policy makers and practitioners who seek to protect community safety, use resources wisely and improve outcomes for the youth and families of our state.

This report is submitted by the Illinois Juvenile Justice Commission in partnership with the Center for Prevention Research and Development at the University of Illinois and the Loyola University Chicago Center for Criminal Justice Research, Policy and Practice in fulfillment of the Commission's mandate in Public Act 99-0258.

Acknowledgements

A special appreciation is extended to the various Circuit Clerks, State's Attorneys and Public Defenders across Illinois for providing data on filed motions to transfer youth to adult court. Collecting this type of case level data poses varying degrees of complexity depending upon the size and resources of the reporting agencies. There is no one system or database which contains this data. Often times collecting and verifying this data requires multiple contacts to Circuit Clerks and State's Attorneys. Only through the collaboration of these agencies, their hard work and due diligence in collecting this data is this report possible.

2016 Juvenile Transfer Motion Updates

During the reporting cycle for calendar year 2017 a total of seven Illinois counties reported juvenile transfer cases that had been filed in previous reporting year. These six counties reported 34 youth with a grand total of 40 motions to transfer a juvenile to adult court. For the calendar year 2016, a total of 100 youth and 124 juvenile transfer motions were reported. These newly reported cases bring the amended total to 134 youth and 164 juvenile transfer motions.

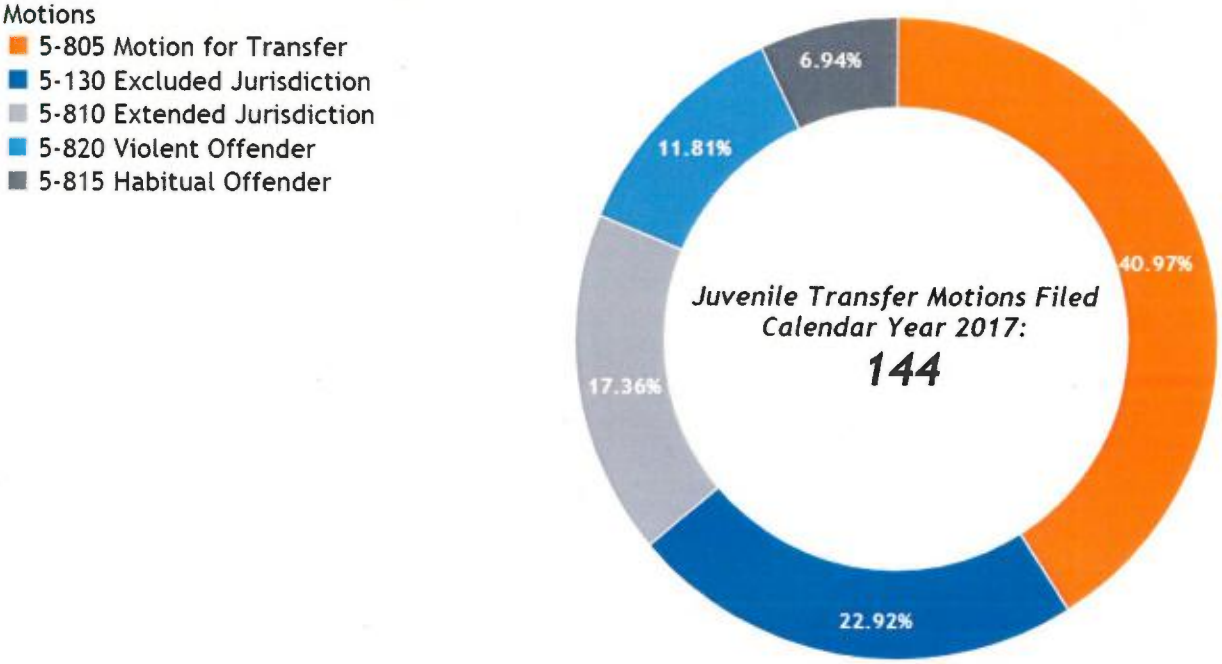
Youth by Age

5-130 Excluded Jurisdiction	Cook	16 Year-Olds	12
		17 Year-Olds	13
5-805 Motion for Transfer	Lake	17 Year-Olds	2
	Peoria	17 Year-Olds	1
	Saline	17 Year-Olds	3
	Sangamon	14 Year-Olds	1
	Vermilion	17 Year-Olds	1
	Woodford	16 Year-Olds	1
		Youth Total	34

Charges by Age

5-130 Excluded Jurisdiction	Cook	16 Year-Olds	Agg. Battery	1
			Agg. Criminal Sexual Assault	7
			First Degree Murder	4
			Home Invasion	1
		17 Year-Olds	First Degree Murder	14
5-805 Motion for Transfer	Lake	17 Year-Olds	Agg. Vehicular Hijacking	1
			Burglary	1
	Peoria	17 Year-Olds	Unlwfl. Poss. Weap. by Street Gang ..	1
	Saline	17 Year-Olds	Agg. Battery	4
			Home Invasion	1
	Sangamon	14 Year-Olds	Agg. Battery	1
	Vermilion	17 Year-Olds	Agg. Battery	1
	Woodford	16 Year-Olds	Burglary	2
			Crim. Tres. to Resid.	1
			Thft. of Mtr. Veh. Parts/Accessor.	1
			Charges Total	40

2017 Juvenile Transfer Motion Type Comparison



NOTE: Individual youth may be subject to multiple proceedings and/or charges. Therefore, the number of proceedings and/or charges may exceed the number of youth in some data tables.

2016-2017 Comparison Data

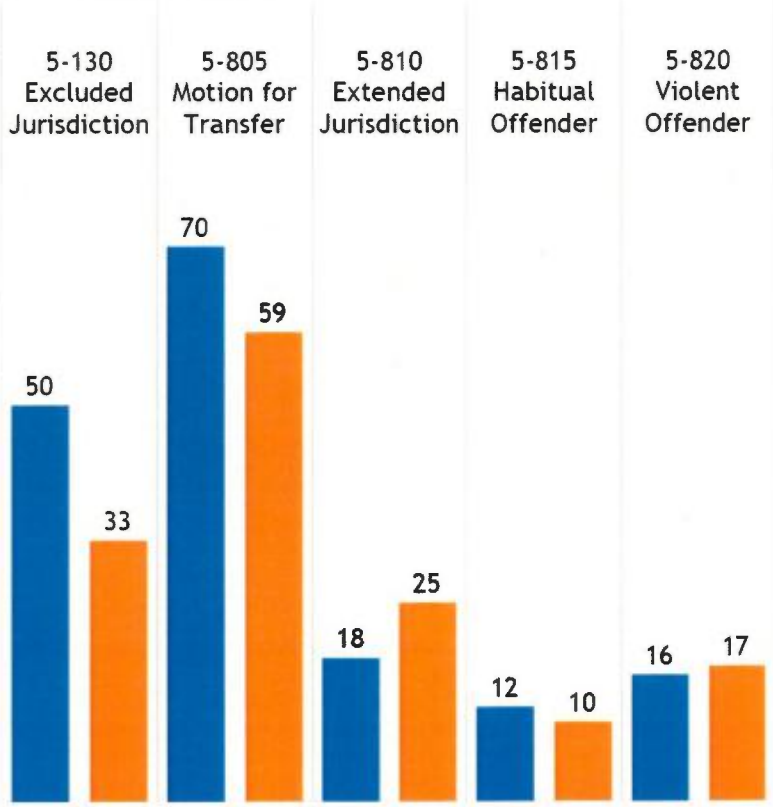
These graphs depict a year by year comparison of motion types, youth age and youth gender for 2016-2017. The figure to the right provides breakdown of the five difference motion types by year. The figure at the bottom left provides a breakdown of the age of the youth and the figure at the bottom right provides a breakdown of gender.

2016 2017

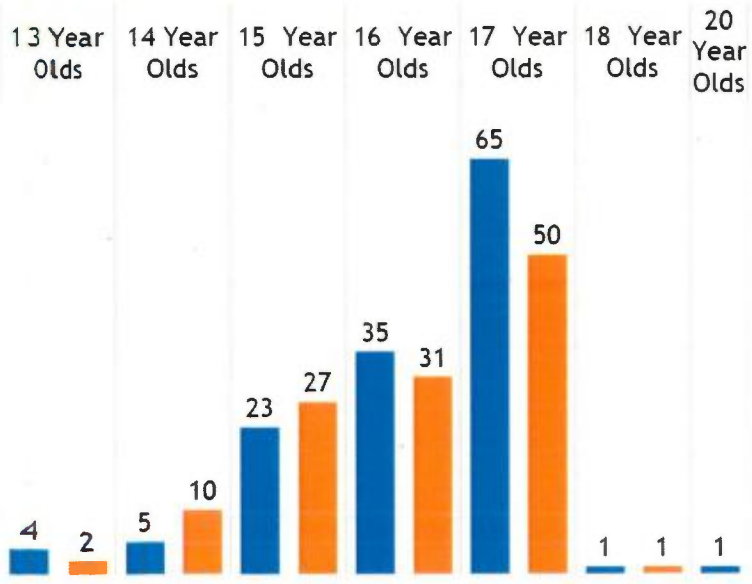
Motion Type by Year

Motion Type	2016	2017
5-130 Excluded Jurisdiction	50	33
5-805 Motion for Transfer	70	59
5-810 Extended Jurisdiction	18	25
5-815 Habitual Offender	12	10
5-820 Violent Offender	16	17
Grand Total	164	129

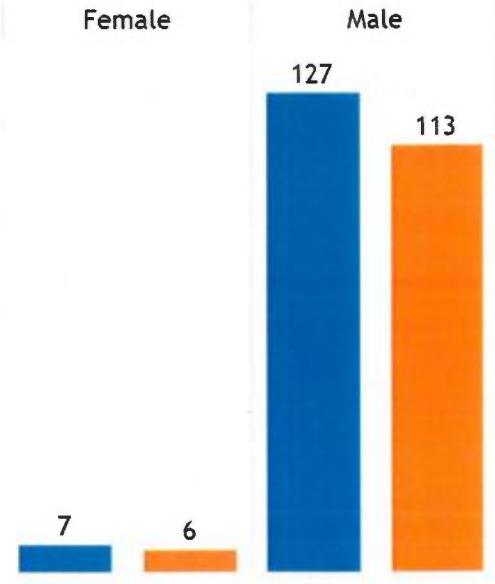
Motion Type by Year



Youth by Age by Year



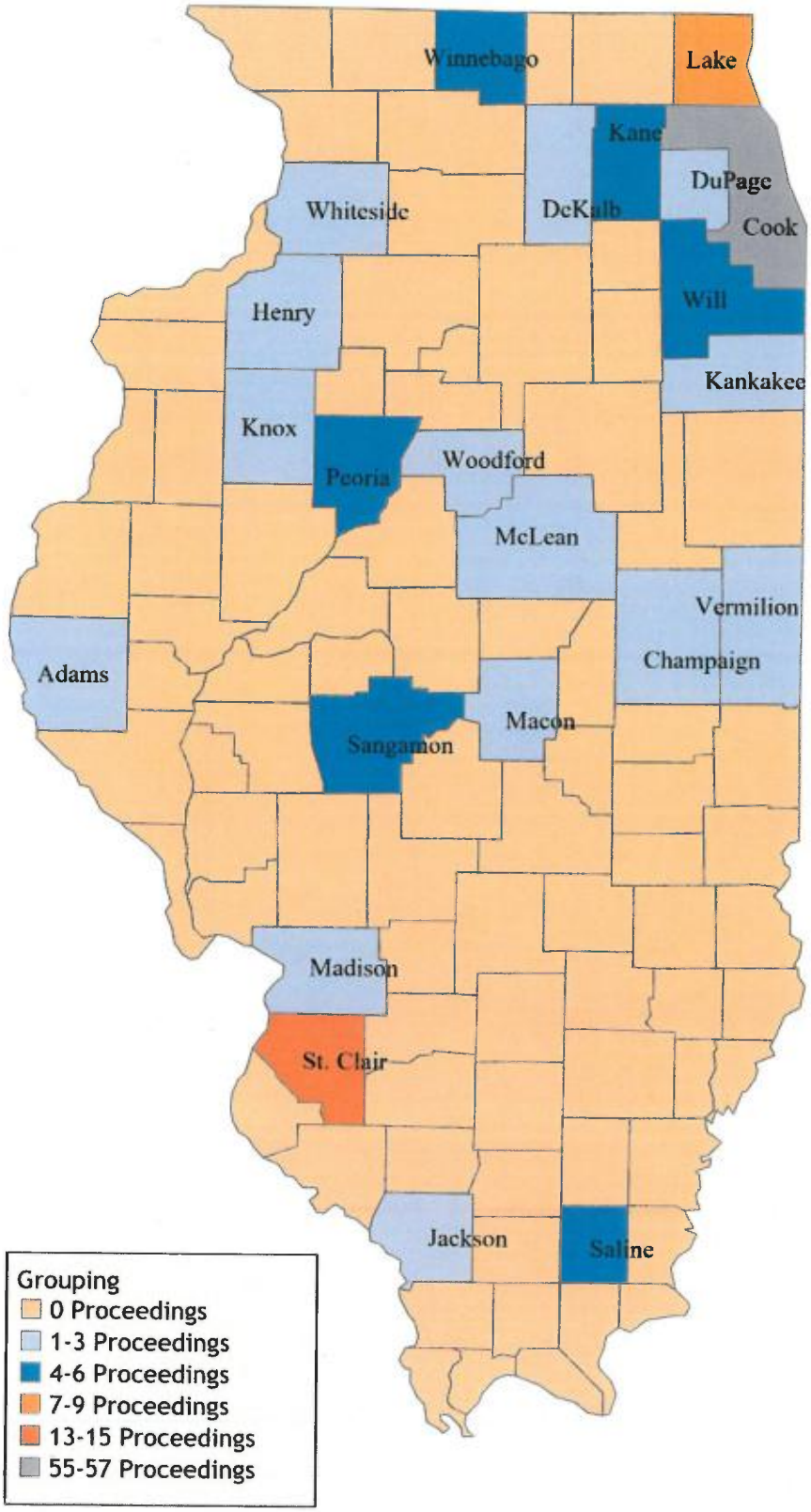
Youth by Gender by Year



Illinois Juvenile Transfers at a Glance

For the reporting period of January 1, 2017 through December 31, 2017 a total of 102 Illinois counties reported data on motions to transfer youth to adult courts. A total of 23 Illinois counties reported at least one motion while 79 counties reported zero motions. The geographic representation of those motions are depicted in an interactive Illinois county boundary map located to the right. Each county has a detailed report, which can be viewed by selecting the appropriate county from the map. The table below shows the counties which reported motions, that county's total number of cases and total number of youth.

	# Cases	# Youth
Adams	1	1
Champaign	3	2
Cook	57	53
DeKalb	3	2
DuPage	1	1
Henry	1	1
Jackson	1	1
Kane	5	4
Kankakee	2	2
Knox	1	1
Lake	7	7
Macon	1	1
Madison	1	1
McLean	2	1
Peoria	6	6
Saline	4	4
Sangamon	6	6
St. Clair	13	11
Vermilion	2	2
Whiteside	2	2
Will	4	4
Winnebago	5	5
Woodford	1	1
State Total	129	119

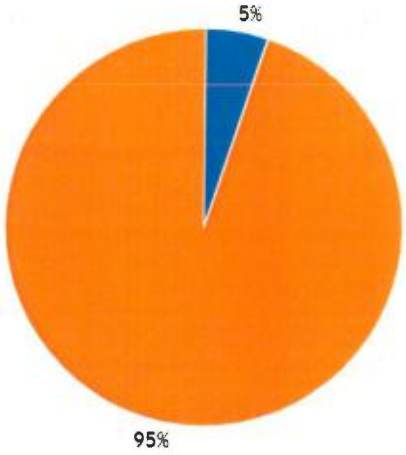


Demographics for all Proceedings Calendar Year 2017

Youth by Age

Total Distinct Youth: 119

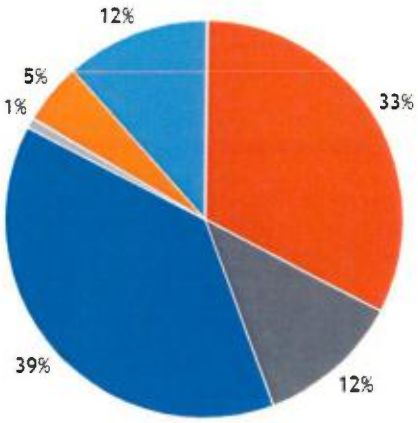
Gender



Female
Male

Female	6
Male	113
Grand Total	119

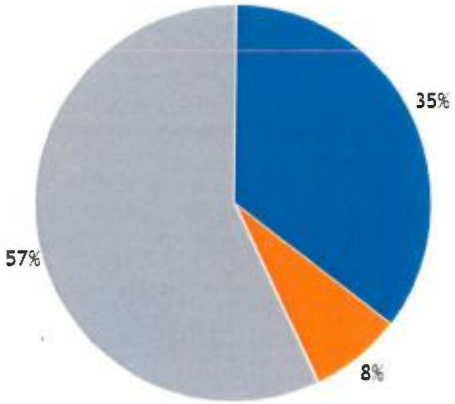
Race



Unknown
White
Black
Black/ Afr ..
Multi-Racial
Other

Black/ Afr Amer.	46
Unknown	39
Black	14
White	14
Other	6
Multi-Racial	1
Grand Total	119

Ethnicity



Unknown
Hispanic
Non-Hispanic

Non-Hispanic	68
Unknown	42
Hispanic	9
Grand Total	119

NOTE: Individual youth may be subject to multiple proceedings and/or charges. Therefore, the number of proceedings and/or charges may exceed the number of youth in some data tables.

Charges by Gender Calendar Year 2017

Male Youth by Charges

First Degree Murder	34
Armed Robbery	22
Agg. Vehicular Hijacking	11
Agg. Battery	9
Agg. Crim. Sex. Assault	6
Agg. Robbery	4
Agg. Unlwfl. Use of Weap.	4
Robbery	3
Agg. Crim. Sex. Abuse	2
Agg. Discharge of a Fir.	2
Agg. Kidnapping	2
Agg. Poss. of Stolen Fir.	2
Home Invasion	2
Manuf. of Con. Sub.	2
Residential Burglary	2
Theft of MV Parts or Accessor.	2
Unlwfl. Poss. Weap. St. Gang ..	2
Animal Torture	1
Armed Violence	1
Attmpt. Murder	1
Burglary	1
Crim. Sexual Aslt.	1
Disarming Off. or Corr. Emp.	1
Domestic Battery	1
Escape - Failure to Report	1
Involuntary Manslaughter	1
Poss. of Stolen Fir.	1
Pred. Crim. Sex. Aslt of a Child	1
Unlwfl. Poss. of Firearms & Fir..	1
Unlwfl. Use of Weap.	1
Total Male Youth	**123**

Female Youth by Charges

First Degree Murder	3
Involuntary Manslaughter	2
Agg. Domestic Battery	1
Total Female Youth	**6**

Charges by Gender

Female	6
Male	123
Total Youth	**129**

NOTE: Individual youth may be subject to multiple proceedings and/or charges. Therefore, the number of proceedings and/or charges may exceed the number of youth in some data tables.

Charges by Age Calendar Year 2017

13 Year Olds

Agg. Crim. Sex. Abuse	1
Armed Robbery	1
Age Group Total	2

14 Year Olds

Armed Robbery	3
Agg. Crim. Sex. Assault	2
First Degree Murder	2
Agg. Unlwfl. Use of Weap.	1
Agg. Vehicular Hijacking	1
Poss. of Stolen Fir.	1
Unlwfl. Poss. Weap. St. Gang Mbr.	1
Age Group Total	10

15 Year Olds

First Degree Murder	14
Agg. Vehicular Hijacking	3
Agg. Crim. Sex. Assault	2
Armed Robbery	2
Residential Burglary	2
Agg. Robbery	1
Agg. Unlwfl. Use of Weap.	1
Burglary	1
Crim. Sexual Aslt.	1
Robbery	1
Age Group Total	28

16 Year Olds

First Degree Murder	12
Agg. Battery	4
Armed Robbery	2
Agg. Unlwfl. Use of Weap.	2
Agg. Poss. of Stolen Fir.	2
Unlwfl. Use of Weap.	1
Unlwfl. Poss. Weap. St. Gang Mbr.	1
Robbery	1
Involuntary Manslaughter	1
Attmpt. Murder	1
Armed Violence	1
Agg. Vehicular Hijacking	1
Agg. Robbery	1
Agg. Kidnapping	1
Agg. Discharge of a Fir.	1
Agg. Crim. Sex. Assault	1
Age Group Total	33

17 Year Olds

Armed Robbery	14
First Degree Murder	9
Agg. Vehicular Hijacking	6
Agg. Battery	5
Agg. Robbery	2
Home Invasion	2
Involuntary Manslaughter	2
Manuf. of Con. Sub.	2
Theft of MV Parts or Accessor.	2
Agg. Crim. Sex. Assault	1
Agg. Discharge of a Fir.	1
Agg. Domestic Battery	1
Agg. Kidnapping	1
Animal Torture	1
Disarming Off. or Corr. Emp.	1
Domestic Battery	1
Escape - Failure to Report	1
Pred. Crim. Sex. Aslt of a Child	1
Robbery	1
Unlwfl. Poss. of Firearms & Fir. Ammo.	1
Age Group Total	55

18 Year Olds

Agg. Crim. Sex. Abuse	1
Age Group Total	1

Charges by Age

13 Year-Olds	2
14 Year-Olds	10
15 Year-Olds	28
16 Year-Olds	33
17 Year-Olds	55
18 Year-Olds	1
Grand Total	129

NOTE: Individual youth may be subject to multiple proceedings and/or charges. Therefore, the number of proceedings and/or charges may exceed the number of youth in some data tables.

Charges by Race Calendar Year 2017

Black/African American

Armed Robbery	11
Agg. Battery	6
First Degree Murder	6
Agg. Crim. Sex. Assault	4
Agg. Vehicular Hijacking	3
Agg. Discharge of a Fir.	2
Agg. Poss. of Stolen Fir.	2
Agg. Robbery	2
Theft of MV Parts or Accessor.	2
Unlwfl. Poss. Weap. St. Gang Mbr.	2
Agg. Domestic Battery	1
Agg. Unlwfl. Use of Weap.	1
Attmpt. Murder	1
Burglary	1
Crim. Sexual Aslt.	1
Disarming Off. or Corr. Emp.	1
Domestic Battery	1
Home Invasion	1
Manuf. of Con. Sub.	1
Poss. of Stolen Fir.	1
Residential Burglary	1
Robbery	1
Unlwfl. Poss. of Firearms & Fir. Ammo.	1
Racial Group Total	52

Multi-Racial

Escape - Failure to Report	1
Racial Group Total	1

Other Race

First Degree Murder	3
Agg. Battery	1
Agg. Crim. Sex. Assault	1
Agg. Vehicular Hijacking	1
Racial Group Total	6

White

First Degree Murder	6
Agg. Crim. Sex. Abuse	2
Involuntary Manslaughter	2
Agg. Kidnapping	1
Animal Torture	1
Armed Violence	1
Pred. Crim. Sex. Aslt of a Child	1
Racial Group Total	14

Unknown Race

First Degree Murder	14
Armed Robbery	11
Agg. Vehicular Hijacking	7
Agg. Unlwfl. Use of Weap.	3
Agg. Robbery	2
Robbery	2
Home Invasion	1
Manuf. of Con. Sub.	1
Residential Burglary	1
Racial Group Total	42

Charges by Race

Black/ Afr Amer.	52
Unknown	42
Black	16
White	14
Other	6
Multi-Racial	1
Grand Total	129

NOTE: Individual youth may be subject to multiple proceedings and/or charges. Therefore, the number of proceedings and/or charges may exceed the number of youth in some data tables.

Charges by County Calendar Year 2017

Adams	Pred. Crim. Sex. Aslt of a Child	1
	County Total	1
Champai..	Agg. Battery	1
	Agg. Unlwfl. Use of Weap.	1
	Residential Burglary	1
	County Total	3
Cook	First Degree Murder	24
	Armed Robbery	11
	Agg. Battery	2
	Agg. Vehicular Hijacking	7
	Agg. Crim. Sex. Assault	1
	Agg. Unlwfl. Use of Weap.	3
	Involuntary Manslaughter	1
	Robbery	2
	Agg. Kidnapping	2
	Agg. Robbery	2
	Residential Burglary	1
	Unlwfl. Use of Weap.	1
	County Total	57
DeKalb	Disarming Off. or Corr. Emp.	1
	Domestic Battery	1
	Manuf. of Con. Sub.	1
	County Total	3
DuPage	Attmpt. Murder	1
	County Total	1
Henry	Animal Torture	1
	County Total	1
Jackson	Escape - Failure to Report	1
	County Total	1
Kane	Armed Robbery	1
	Agg. Battery	3
	Robbery	1
	County Total	5
Kankakee	Agg. Battery	1
	Unlwfl. Poss. of Firearms & Fir. Am..	1
	County Total	2
Knox	Agg. Crim. Sex. Assault	1
	County Total	1
Lake	First Degree Murder	1
	Agg. Battery	1
	Agg. Crim. Sex. Assault	2
	Involuntary Manslaughter	2
	Agg. Crim. Sex. Abuse	1
	County Total	7
Macon	Agg. Vehicular Hijacking	1
	County Total	1
Madison	First Degree Murder	1
	County Total	1
McLean	Agg. Discharge of a Fir.	2
	County Total	2
Peoria	Armed Robbery	5
	Unlwfl. Poss. Weap. St. Gang Mbr.	1
	County Total	6
Saline	First Degree Murder	3
	Home Invasion	1
	County Total	4
Sangamon	First Degree Murder	1
	Unlwfl. Poss. Weap. St. Gang Mbr.	1
	Agg. Battery	1
	Agg. Domestic Battery	1
	Armed Violence	1
	Manuf. of Con. Sub.	1
	Poss. of Stolen Fir.	1
	County Total	6
St. Clair	First Degree Murder	3
	Armed Robbery	1
	Agg. Vehicular Hijacking	3
	Agg. Poss. of Stolen Fir.	2
	Agg. Robbery	2
	Theft of MV Parts or Accessor.	2
	County Total	13
Vermilion	First Degree Murder	1
	Home Invasion	1
	County Total	2
Whiteside	First Degree Murder	2
	County Total	2
Will	Armed Robbery	4
	County Total	4
Winnebago	First Degree Murder	1
	Agg. Crim. Sex. Assault	2
	Agg. Crim. Sex. Abuse	1
	Crim. Sexual Aslt.	1
	County Total	5
Woodford	Burglary	1
	County Total	1

State Total Charges: 129

NOTE: Individual youth may be subject to multiple proceedings and/or charges. Therefore, the number of proceedings and/or charges may exceed the number of youth in some data tables.

Charges by Ethnicity Calendar Year 2017

Hispanic

First Degree Murder	5
Agg. Battery	1
Agg. Crim. Sex. Assault	1
Agg. Vehicular Hijacking	1
Manuf. of Con. Sub.	1
Ethnicity Group Total	9

Non-Hispanic

First Degree Murder	19
Armed Robbery	11
Agg. Battery	8
Agg. Crim. Sex. Assault	5
Involuntary Manslaughter	3
Agg. Crim. Sex. Abuse	2
Agg. Discharge of a Fir.	2
Agg. Kidnapping	2
Agg. Poss. of Stolen Fir.	2
Agg. Robbery	2
Agg. Vehicular Hijacking	2
Theft of MV Parts or Accessor.	2
Unlwfl. Poss. Weap. St. Gang Mbr.	2
Agg. Domestic Battery	1
Agg. Unlwfl. Use of Weap.	1
Armed Violence	1
Crim. Sexual Aslt.	1
Escape - Failure to Report	1
Home Invasion	1
Manuf. of Con. Sub.	1
Poss. of Stolen Fir.	1
Pred. Crim. Sex. Aslt of a Child	1
Residential Burglary	1
Robbery	1
Unlwfl. Poss. of Firearms & Fir. Ammo.	1
Unlwfl. Use of Weap.	1
Ethnicity Group Total	74

Unknown Ethnicity

First Degree Murder	13
Armed Robbery	11
Agg. Vehicular Hijacking	8
Agg. Unlwfl. Use of Weap.	3
Agg. Robbery	2
Robbery	2
Animal Torture	1
Attmpt. Murder	1
Burglary	1
Disarming Off. or Corr. E..	1
Domestic Battery	1
Home Invasion	1
Residential Burglary	1
Ethnicity Group Total	46

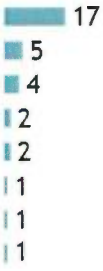
Charges by Ethnicity

Hispanic	9
Non-Hispanic	74
Unknown	46
Grand Total	129

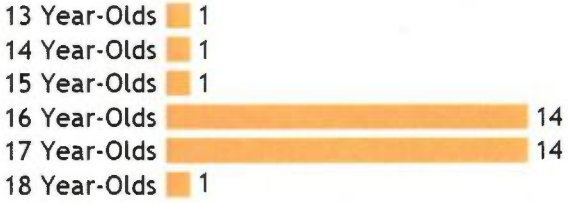
NOTE: Individual youth may be subject to multiple proceedings and/or charges. Therefore, the number of proceedings and/or charges may exceed the number of youth in some data tables.

5-130 Excluded Jurisdiction Calendar Year 2017

Charges

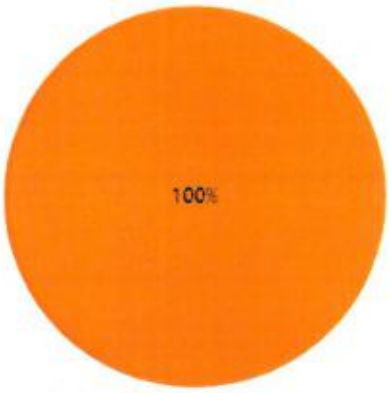


Youth by Age



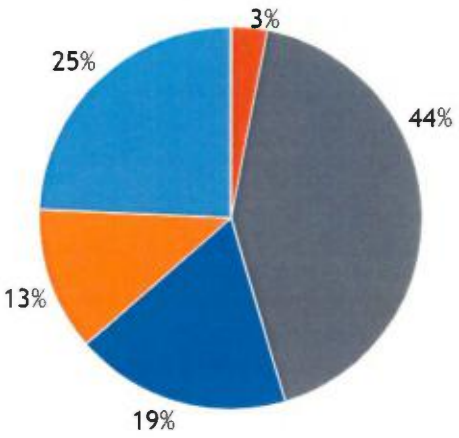
Total 5-130 Excluded Jurisdiction: 33

Gender



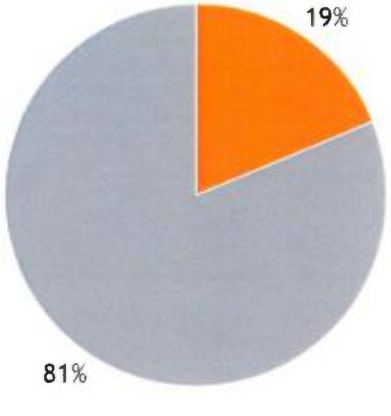
Male	32
Grand Total	32

Race



Black	14
White	8
Black/ Afr Amer.	6
Other	4
Unknown	1
Grand Total	32

Ethnicity



Non-Hispanic	26
Hispanic	6
Grand Total	32

NOTE: Individual youth may be subject to multiple proceedings and/or charges. Therefore, the number of proceedings and/or charges may exceed the number of youth in some data tables.

5-805 Motion for Transfer Calendar Year 2017

Charges

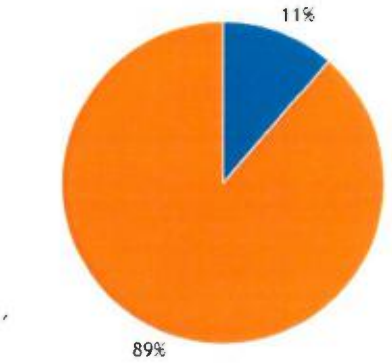
First Degree Murder	18
Armed Robbery	14
Agg. Discharge of a Fir.	2
Agg. Vehicular Hijacking	2
Home Invasion	2
Involuntary Manslaughter	2
Manuf. of Con. Sub.	2
Theft of MV Parts or Accessor.	2
Unlwfl. Poss. Weap. St. Gang Mbr.	2
Agg. Battery	1
Agg. Crim. Sex. Assault	1
Agg. Domestic Battery	1
Agg. Robbery	1
Agg. Unlwfl. Use of Weap.	1
Armed Violence	1
Attmpt. Murder	1
Burglary	1
Disarming Off. or Corr. Emp.	1
Domestic Battery	1
Escape - Failure to Report	1
Poss. of Stolen Fir.	1
Residential Burglary	1
Unlwfl. Poss. of Firearms & Fir. Ammo.	1

Youth by Age

13 Year-Olds	1
14 Year-Olds	5
15 Year-Olds	17
16 Year-Olds	9
17 Year-Olds	23

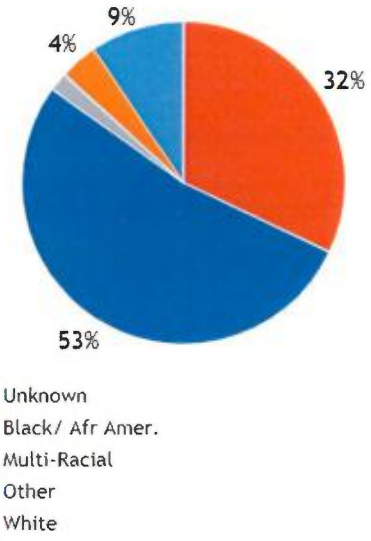
Total 5-805 Motion for Transfer: 59

Gender



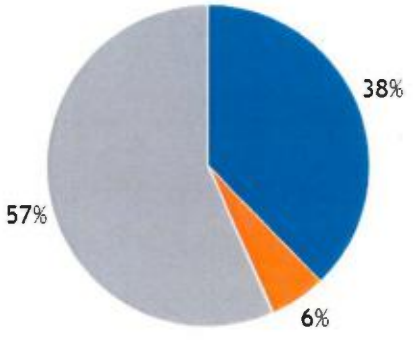
Male	47
Female	6
Grand Total	53

Race



Black/ Afr Amer.	28
Unknown	17
White	5
Other	2
Multi-Racial	1
Grand Total	53

Ethnicity



Non-Hispanic	30
Unknown	20
Hispanic	3
Grand Total	53

NOTE: Individual youth may be subject to multiple proceedings and/or charges. Therefore, the number of proceedings and/or charges may exceed the number of youth in some data tables.

5-810 Extended Jurisdiction Calendar Year 2017

Charges

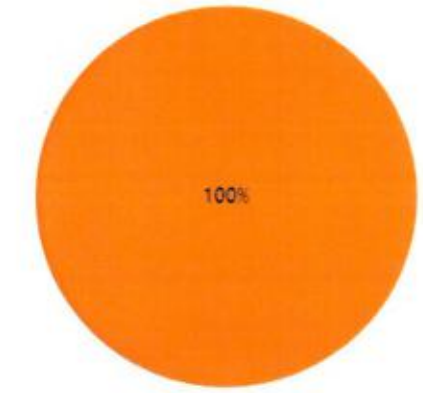
First Degree Murder	7
Armed Robbery	6
Agg. Battery	3
Agg. Poss. of Stolen Fir.	2
Agg. Vehicular Hijacking	2
Agg. Crim. Sex. Assault	1
Agg. Robbery	1
Animal Torture	1
Crim. Sexual Aslt.	1
Robbery	1

Youth by Age

14 Year-Olds	2
15 Year-Olds	9
16 Year-Olds	5
17 Year-Olds	6

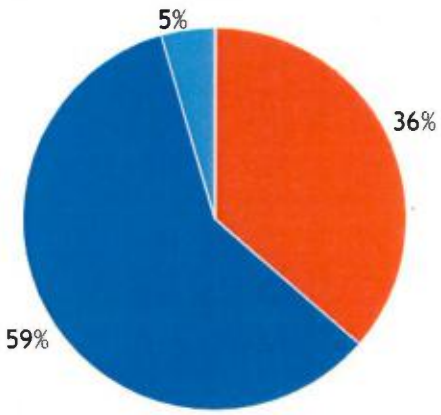
Total 5-810 Extended Jurisdiction: 25

Gender



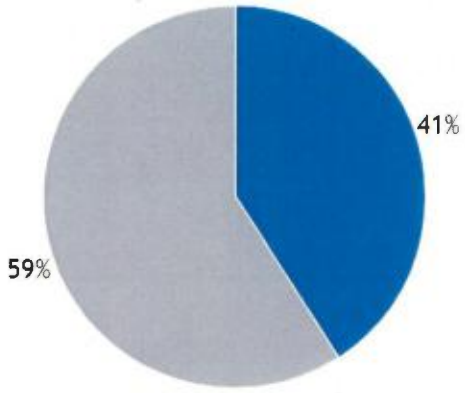
Male	22
Grand Total	22

Race



Black/ Afr Amer.	13
Unknown	8
White	1
Grand Total	22

Ethnicity



Non-Hispanic	13
Unknown	9
Grand Total	22

NOTE: Individual youth may be subject to multiple proceedings and/or charges. Therefore, the number of proceedings and/or charges may exceed the number of youth in some data tables.

5-815 Habitual Offender Calendar Year 2017

Charges

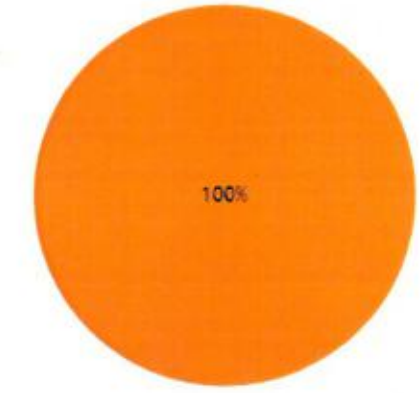
Armed Robbery	4
Agg. Vehicular Hijacking	2
Agg. Robbery	1
First Degree Murder	1
Residential Burglary	1
Robbery	1

Youth by Age

14 Year-Olds	1
15 Year-Olds	4
16 Year-Olds	1
17 Year-Olds	3

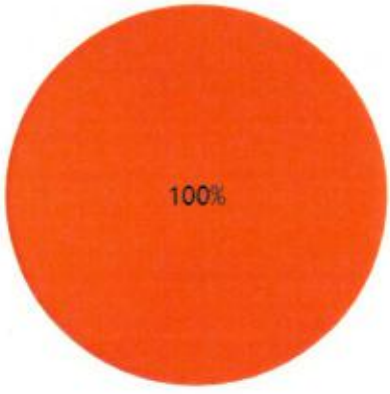
Total 5-815 Habitual Offender: 10

Gender



Male	9
Grand Total	9

Race



Unknown	9
Grand Total	9

Ethnicity

Unknown	9
Grand Total	9

NOTE: Individual youth may be subject to multiple proceedings and/or charges. Therefore, the number of proceedings and/or charges may exceed the number of youth in some data tables.

5-820 Violent Offender Calendar Year 2017

Charges

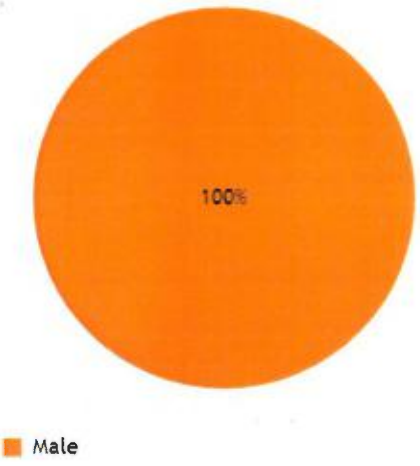
Agg. Vehicular Hijacking	6
Armed Robbery	5
Agg. Unlwfl. Use of Weap.	3
Robbery	2
Agg. Robbery	1

Youth by Age

14 Year-Olds	1
15 Year-Olds	3
16 Year-Olds	4
17 Year-Olds	8

Total 5-820 Violent Offender: 17

Gender

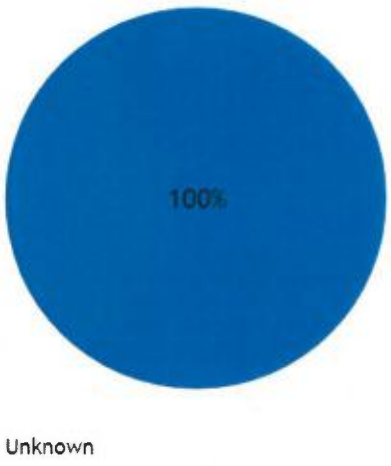


Male	16
Grand Total	16

Race

Unknown	16
Grand Total	16

Ethnicity



Unknown	16
Grand Total	16

NOTE: Individual youth may be subject to multiple proceedings and/or charges. Therefore, the number of proceedings and/or charges may exceed the number of youth in some data tables.

Adams County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

Adams County All Motions Year Comparison

Calendar Year 2017 All Motions

 # Youth by Age

17 Year-Olds	1
Youth Total	1

Age at Offense

17 Year-Olds	Pred. Crim. Sex. Aslt of a Child	1

 # Charges by Age

17 Year-Olds	1
Charges Total	1

Proceedings Summary

5-130 Excluded Jurisdiction Comparison

2016	2017
2 Motions	1 Motions

Calendar Year: 2017 Motion Type: 5-130 Excluded Jurisdiction

Pred. Crim. Sex. Aslt of a Child	1

Age		Gender		Race		Ethnicity	
17 Year-Olds	1	Male	1	White	1	Non-Hispanic	1
		Grand Total	1	Grand Total	1	Grand Total	1

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

Champaign County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

Champaign County All Motions Year Comparison

Calendar Year 2017 All Motions

 # Youth by Age

15 Year-Olds	1
16 Year-Olds	1
17 Year-Olds	1
Youth Total	2

Age at Offense

15 Year-Olds	Residential Burglary	1
16 Year-Olds	Agg. Unlwfl. Use of Weap.	1
17 Year-Olds	Agg. Battery	1

 # Charges by Age

15 Year-Olds	1
16 Year-Olds	1
17 Year-Olds	1
Charges Total	3

Proceedings Summary

5-805 Motion for transfer Comparison

2016	2017
4 Motions	2 Motions

Calendar Year: 2017 Motion Type: 5-805 Motion for transfer

Agg. Battery	1
Agg. Unlwfl. Use of Weap.	1
Residential Burglary	1

Age

15 Year-Olds	1
16 Year-Olds	1
17 Year-Olds	1

Gender

Male	2
Grand Total	2

Race

Black/ Afr Amer.	2
Grand Total	2

Ethnicity

Non-Hispanic	2
Grand Total	2

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

Cook County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

Cook County All Motions Year Comparison

Calendar Year 2017 All Motions

# Youth by Age	
14 Year-Olds	2
15 Year-Olds	14
16 Year-Olds	15
17 Year-Olds	22
Youth Total	53

# Charges by Age	
14 Year-Olds	2
15 Year-Olds	15
16 Year-Olds	16
17 Year-Olds	24
Charges Total	57

Age at Offense		
14 Year-Olds	Agg. Unlwfl. Use of Weap.	1
	Agg. Vehicular Hijacking	1
15 Year-Olds	Agg. Robbery	1
	Agg. Unlwfl. Use of Weap.	1
	Armed Robbery	2
	First Degree Murder	9
	Residential Burglary	1
	Robbery	1
16 Year-Olds	Agg. Battery	2
	Agg. Kidnapping	1
	Agg. Unlwfl. Use of Weap.	1
	Agg. Vehicular Hijacking	1
	Armed Robbery	2
	First Degree Murder	6
	Involuntary Manslaughter	1
	Robbery	1
	Unlwfl. Use of Weap.	1
17 Year-Olds	Agg. Crim. Sex. Assault	1
	Agg. Kidnapping	1
	Agg. Robbery	1
	Agg. Vehicular Hijacking	5
	Armed Robbery	7
	First Degree Murder	9

Proceedings Summary

5-130 Excluded Jurisdiction Comparison

2016	2017
25 Motions	20 Motions

Calendar Year: 2017 Motion Type: 5-130 Excluded Jurisdiction

Agg. Battery	2
Agg. Crim. Sex. Assault	1
Agg. Kidnapping	2
First Degree Murder	14
Involuntary Manslaughter	1
Unlwfl. Use of Weap.	1

Age	
16 Year-Olds	10
17 Year-Olds	10

Gender	
Male	20
Grand Total	20

Race	
Unknown	1
Black	14
Other	1
White	5
Grand Total	20

Ethnicity	
Hispanic	3
Non-Hispanic	17
Grand Total	20

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

Cook County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions

Calendar Year 2017

Proceedings Continued

5-805 Motion for transfer Comparison

2016	2017
11 Motions	12 Motions

Calendar Year: 2017 Motion Type: 5-805 Motion for transfer

Armed Robbery	5
First Degree Murder	9

Age	
15 Year-Olds	9
16 Year-Olds	1
17 Year-Olds	2

Gender	
Male	12
Grand Total	12

Race	
Unknown	12
Grand Total	12

Ethnicity	
Unknown	12
Grand Total	12

5-810 Extended Jurisdiction Comparison

2016	2017
9 Motions	8 Motions

Calendar Year: 2017 Motion Type: 5-810 Extended Jurisdiction

Armed Robbery	4
First Degree Murder	6

Age	
15 Year-Olds	5
17 Year-Olds	3

Gender	
Male	8
Grand Total	8

Race	
Unknown	8
Grand Total	8

Ethnicity	
Unknown	8
Grand Total	8

5-815 Habitual Offender Comparison

2016	2017
7 Motions	9 Motions

Calendar Year: 2017 Motion Type: 5-815 Habitual Offender

Agg. Robbery	1
Agg. Vehicular Hijacking	2
Armed Robbery	4
First Degree Murder	1
Residential Burglary	1
Robbery	1

Age	
14 Year-Olds	1
15 Year-Olds	4
16 Year-Olds	1
17 Year-Olds	3

Gender	
Male	9
Grand Total	9

Race	
Unknown	9
Grand Total	9

Ethnicity	
Unknown	9
Grand Total	9

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.
NOTE: Cook County did not report data on 5-130 Excluded Jurisdiction (Automatic Transfers) motions.

Cook County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

Proceedings Continued

5-820 Violent Offender Comparison

2016	2017
15 Motions	16 Motions

Calendar Year: 2017 Motion Type: 5-820 Violent Offender

Agg. Robbery	1
Agg. Unlwfl. Use of Weap.	3
Agg. Vehicular Hijacking	6
Armed Robbery	5
Robbery	2

Age	
14 Year-Olds	1
15 Year-Olds	3
16 Year-Olds	4
17 Year-Olds	8

Gender	
Male	16
Grand Total	16

Race	
Unknown	16
Grand Total	16

Ethnicity	
Unknown	16
Grand Total	16

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.
NOTE: Cook County did not report data on 5-130 Excluded Jurisdiction (Automatic Transfers) motions.

DeKalb County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

DeKalb County All Motions Year Comparison

Calendar Year 2017 All Motions

# Youth by Age	
17 Year-Olds	2
Youth Total	2

# Charges by Age	
17 Year-Olds	3
Charges Total	3

Age at Offense		
17 Year-Olds	Disarming Off. or Corr. Emp.	1
	Domestic Battery	1
	Manuf. of Con. Sub.	1

Proceedings Summary

5-805 Motion for transfer Comparison

2016	2017
2 Motions	2 Motions

Calendar Year: 2017 Motion Type: 5-805 Motion for transfer

Disarming Off. or Corr. Emp.	1
Domestic Battery	1
Manuf. of Con. Sub.	1

Age	
17 Year-Olds	2

Gender	
Male	2
Grand Total	2

Race	
Unknown	1
Black/ Afr Amer.	1
Grand Total	2

Ethnicity	
Unknown	1
Hispanic	1
Grand Total	2

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

DuPage County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

DuPage County All Motions Year Comparison

Calendar Year 2017 All Motions

# Youth by Age	
16 Year-Olds	1
Youth Total	1

Age at Offense		
16 Year-Olds	Attmpt. Murder	1

# Charges by Age	
16 Year-Olds	1
Charges Total	1

Proceedings Summary

5-805 Motion for transfer Comparison

2017
1 Motions

Calendar Year: 2017 Motion Type: 5-805 Motion for transfer

Attmpt. Murder	1

Age	
16 Year-Olds	1

Gender	
Male	1
Grand Total	1

Race	
Black/ Afr Amer.	1
Grand Total	1

Ethnicity	
Unknown	1
Grand Total	1

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

Henry County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

Henry County All Motions Year Comparison

Calendar Year 2017 All Motions

# Youth by Age	
17 Year-Olds	1
Youth Total	1

Age at Offense		
17 Year-Olds	Animal Torture	1

# Charges by Age	
17 Year-Olds	1
Charges Total	1

Proceedings Summary

5-810 Extended Jurisdiction Comparison

2017
1 Motions

Calendar Year: 2017 Motion Type: 5-810 Extended Jurisdiction

Animal Torture	1

Age	
17 Year-Olds	1

Gender	
Male	1
Grand Total	1

Race	
White	1
Grand Total	1

Ethnicity	
Unknown	1
Grand Total	1

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

Jackson County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

Jackson County All Motions Year Comparison

Calendar Year 2017 All Motions

# Youth by Age	
17 Year-Olds	1
Youth Total	1

Age at Offense		
17 Year-Olds	Escape - Failure to Report	1

# Charges by Age	
17 Year-Olds	1
Charges Total	1

Proceedings Summary

5-805 Motion for transfer Comparison

2016	2017
1 Motions	1 Motions

Calendar Year: 2017 Motion Type: 5-805 Motion for transfer

Escape - Failure to Report	1

Age	
17 Year-Olds	1

Gender	
Male	1
Grand Total	1

Race	
Multi-Racial	1
Grand Total	1

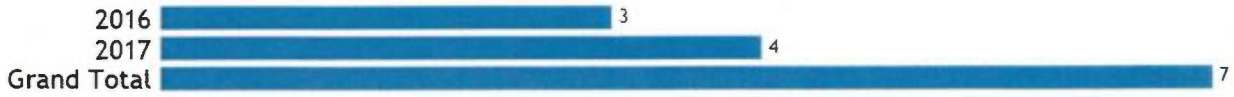
Ethnicity	
Non-Hispanic	1
Grand Total	1

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

Kane County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

Kane County All Motions Year Comparison



Calendar Year 2017 All Motions

 # Youth by Age

16 Year-Olds	2
17 Year-Olds	2
Youth Total	4

 # Charges by Age

16 Year-Olds	2
17 Year-Olds	3
Charges Total	5

Age at Offense

16 Year-Olds	Agg. Battery	2
17 Year-Olds	Agg. Battery	1
	Armed Robbery	1
	Robbery	1

Proceedings Summary

5-810 Extended Jurisdiction Comparison

2016	2017
2 Motions	4 Motions

Calendar Year: 2017 Motion Type: 5-810 Extended Jurisdiction

Agg. Battery	3
Armed Robbery	1
Robbery	1

Age		Gender		Race		Ethnicity	
16 Year-Olds	2	Male	4	Black/ Afr Amer.	4	Non-Hispanic	4
17 Year-Olds	2	Grand Total	4	Grand Total	4	Grand Total	4

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

Kankakee County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

Kankakee County All Motions Year Comparison

 # Youth by Age

17 Year-Olds	2
Youth Total	2

Age at Offense

17 Year-Olds	Agg. Battery	1
	Unlwfl. Poss. of Firearms & Fir. Ammo.	1

 # Charges by Age

17 Year-Olds	2
Charges Total	2

Proceedings Summary

5-130 Excluded Jurisdiction Comparison

2016	2017
1 Motions	1 Motions

Calendar Year: 2017 Motion Type: 5-130 Excluded Jurisdiction

Agg. Battery	1

Age		Gender		Race		Ethnicity	
17 Year-Olds	1	Male	1	Black/ Afr Amer.	1	Non-Hispanic	1
		Grand Total	1	Grand Total	1	Grand Total	1

5-805 Motion for transfer Comparison

2016	2017
1 Motions	1 Motions

Calendar Year: 2017 Motion Type: 5-805 Motion for transfer

Unlwfl. Poss. of Firearms & F..	1

Age		Gender		Race		Ethnicity	
17 Year-Olds	1	Male	1	Black/ Afr Amer.	1	Non-Hispanic	1
Total 5-805 Motion for Transfer: 1		Grand Total	1	Grand Total	1	Grand Total	1

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

Knox County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

Knox County All Motions Year Comparison

Calendar Year 2017 All Motions

# Youth by Age	
15 Year-Olds	1
Youth Total	1

Age at Offense		
15 Year-Olds	Agg. Crim. Sex. Assault	1

# Charges by Age	
15 Year-Olds	1
Charges Total	1

Proceedings Summary

5-810 Extended Jurisdiction Comparison

2017
1 Motions

Calendar Year: 2017 Motion Type: 5-810 Extended Jurisdiction

Agg. Crim. Sex. Assault	1

Age	
15 Year-Olds	1

Gender	
Male	1
Grand Total	1

Race	
Black/ Afr Amer.	1
Grand Total	1

Ethnicity	
Non-Hispanic	1
Grand Total	1

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

Lake County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

Lake County All Motions Year Comparison

Youth by Age

13 Year-Olds	1
14 Year-Olds	1
16 Year-Olds	2
17 Year-Olds	3
Youth Total	7

Age at Offense

13 Year-Olds	Agg. Crim. Sex. Abuse	1
14 Year-Olds	Agg. Crim. Sex. Assault	1
16 Year-Olds	Agg. Crim. Sex. Assault	1
	First Degree Murder	1
17 Year-Olds	Agg. Battery	1
	Involuntary Manslaughter	2

Charges by Age

13 Year-Olds	1
14 Year-Olds	1
16 Year-Olds	2
17 Year-Olds	3
Charges Total	7

Proceedings Summary

5-130 Excluded Jurisdiction Comparison

2016	2017
1 Motions	5 Motions

Calendar Year: 2017 Motion Type: 5-130 Excluded Jurisdiction

Agg. Battery	1
Agg. Crim. Sex. Abuse	1
Agg. Crim. Sex. Assault	2
First Degree Murder	1

Age		Gender		Race		Ethnicity	
13 Year-Olds	1	Male	5	Black/ Afr Amer.	1	Hispanic	3
14 Year-Olds	1	Grand Total	5	Other	3	Non-Hispanic	2
16 Year-Olds	2			White	1	Grand Total	5
17 Year-Olds	1			Grand Total	5		

5-805 Motion for transfer Comparison

2016	2017
6 Motions	2 Motions

Calendar Year: 2017 Motion Type: 5-805 Motion for transfer

Involuntary Manslaughter	2

Age		Gender		Race		Ethnicity	
17 Year-Olds	2	Female	2	White	2	Non-Hispanic	2
		Grand Total	2	Grand Total	2	Grand Total	2

Total 5-805 Motion for Transfer: 2

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

Macon County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

Macon County All Motions Year Comparison

Calendar Year 2017 All Motions

# Youth by Age	
15 Year-Olds	1
Youth Total	1

Age at Offense		
15 Year-Olds	Agg. Vehicular Hijacking	1

# Charges by Age	
15 Year-Olds	1
Charges Total	1

Proceedings Summary

5-805 Motion for transfer Comparison

2017
1 Motions

Calendar Year: 2017 Motion Type: 5-805 Motion for transfer

Agg. Vehicular Hijacking	1

Age		Gender		Race		Ethnicity	
15 Year-Olds	1	Male	1	Black/ Afr Amer.	1	Unknown	1
		Grand Total	1	Grand Total	1	Grand Total	1

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

Madison County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

Madison County All Motions Year Comparison

Calendar Year 2017 All Motions

# Youth by Age	
16 Year-Olds	1
Youth Total	1

Age at Offense		
16 Year-Olds	First Degree Murder	1

# Charges by Age	
16 Year-Olds	1
Charges Total	1

Proceedings Summary

5-805 Motion for transfer Comparison

2016	2017
1 Motions	1 Motions

Calendar Year: 2017 Motion Type: 5-805 Motion for transfer

First Degree Murder	1

Age	
16 Year-Olds	1

Gender	
Male	1
Grand Total	1

Race	
Other	1
Grand Total	1

Ethnicity	
Hispanic	1
Grand Total	1

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

McLean County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

McLean County All Motions Year Comparison

Calendar Year 2017 All Motions

# Youth by Age	
16 Year-Olds	1
17 Year-Olds	1
Youth Total	1

Age at Offense		
16 Year-Olds	Agg. Discharge of a Fir.	1
17 Year-Olds	Agg. Discharge of a Fir.	1

# Charges by Age	
16 Year-Olds	1
17 Year-Olds	1
Charges Total	2

Proceedings Summary

5-805 Motion for transfer Comparison

2016	2017
1 Motions	1 Motions

Calendar Year: 2017 Motion Type: 5-805 Motion for transfer

Agg. Discharge of a Fir.	2

Age		Gender		Race		Ethnicity	
16 Year-Olds	1	Male	1	Black/ Afr Amer.	1	Non-Hispanic	1
17 Year-Olds	1	Grand Total	1	Grand Total	1	Grand Total	1

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

Peoria County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

Peoria County All Motions Year Comparison

Calendar Year 2017 All Motions

# Youth by Age	
13 Year-Olds	1
14 Year-Olds	2
16 Year-Olds	1
17 Year-Olds	2
Youth Total	6

Age at Offense		
13 Year-Olds	Armed Robbery	1
14 Year-Olds	Armed Robbery	2
16 Year-Olds	Unlwfl. Poss. Weap. St. Gang Mbr.	1
17 Year-Olds	Armed Robbery	2

# Charges by Age	
13 Year-Olds	1
14 Year-Olds	2
16 Year-Olds	1
17 Year-Olds	2
Charges Total	6

Proceedings Summary

5-805 Motion for transfer Comparison

2016	2017
1 Motions	6 Motions

Calendar Year: 2017 Motion Type: 5-805 Motion for transfer

Armed Robbery	5
Unlwfl. Poss. Weap. St. Gang Mbr.	1

Age	
13 Year-Olds	1
14 Year-Olds	2
16 Year-Olds	1
17 Year-Olds	2

Gender	
Male	6
Grand Total	6

Race	
Black/ Afr Amer.	6
Grand Total	6

Ethnicity	
Non-Hispanic	6
Grand Total	6

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

Saline County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

Saline County All Motions Year Comparison

Calendar Year 2017 All Motions

# Youth by Age	
15 Year-Olds	1
16 Year-Olds	2
17 Year-Olds	1
Youth Total	4

Age at Offense		
15 Year-Olds	First Degree Murder	1
16 Year-Olds	First Degree Murder	2
17 Year-Olds	Home Invasion	1

# Charges by Age	
15 Year-Olds	1
16 Year-Olds	2
17 Year-Olds	1
Charges Total	4

Proceedings Summary

5-805 Motion for transfer Comparison

2016	2017
4 Motions	4 Motions

Calendar Year: 2017 Motion Type: 5-805 Motion for transfer

First Degree Murder	3
Home Invasion	1

Age	
15 Year-Olds	1
16 Year-Olds	2
17 Year-Olds	1

Gender	
Male	4
Grand Total	4

Race	
Unknown	4
Grand Total	4

Ethnicity	
Unknown	4
Grand Total	4

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

Sangamon County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions

Calendar Year 2017

Sangamon County All Motions Year Comparison

Youth by Age

14 Year-Olds	1
16 Year-Olds	2
17 Year-Olds	3
Youth Total	6

Charges by Age

14 Year-Olds	1
16 Year-Olds	2
17 Year-Olds	3
Charges Total	6

Age at Offense

14 Year-Olds	Poss. of Stolen Fir.	1
	Unlwfl. Poss. Weap. St. Gang Mbr.	1
16 Year-Olds	Armed Violence	1
	First Degree Murder	1
17 Year-Olds	Agg. Battery	1
	Agg. Domestic Battery	1
	Manuf. of Con. Sub.	1

Proceedings Summary

5-130 Excluded Jurisdiction Comparison

2016	2017
2 Motions	2 Motions

Calendar Year: 2017 Motion Type: 5-130 Excluded Jurisdiction

Agg. Battery	1
First Degree Murder	1

Age		Gender		Race		Ethnicity	
16 Year-Olds	1	Male	2	Black/ Afr Amer.	2	Non-Hispanic	2
17 Year-Olds	1	Grand Total	2	Grand Total	2	Grand Total	2

5-805 Motion for transfer Comparison

2016	2017
1 Motions	4 Motions

Calendar Year: 2017 Motion Type: 5-805 Motion for transfer

Agg. Domestic Battery	1
Armed Violence	1
Manuf. of Con. Sub.	1
Poss. of Stolen Fir.	1
Unlwfl. Poss. Weap. St. Gang..	1

Age		Gender		Race		Ethnicity	
14 Year-Olds	1	Female	1	Black/ Afr Amer.	3	Non-Hispanic	4
16 Year-Olds	1	Male	3	White	1	Grand Total	4
17 Year-Olds	2	Grand Total	4	Grand Total	4		

Total 5-805 Motion for Transfer: 4

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

St. Clair County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

St. Clair County All Motions Year Comparison

Youth by Age

14 Year-Olds	3
15 Year-Olds	2
16 Year-Olds	3
17 Year-Olds	3
Youth Total	11

Charges by Age

14 Year-Olds	3
15 Year-Olds	2
16 Year-Olds	4
17 Year-Olds	4
Charges Total	13

Age at Offense

14 Year-Olds	Armed Robbery	1
	First Degree Murder	2
15 Year-Olds	Agg. Vehicular Hijacking	2
16 Year-Olds	Agg. Poss. of Stolen Fir.	2
	Agg. Robbery	1
	First Degree Murder	1
17 Year-Olds	Agg. Robbery	1
	Agg. Vehicular Hijacking	1
	Theft of MV Parts or Accessor.	2

Proceedings Summary

5-130 Excluded Jurisdiction Comparison

2016	2017
7 Motions	1 Motions

Calendar Year: 2017 Motion Type: 5-130 Excluded Jurisdiction

First Degree Murder	1

Age		Gender		Race		Ethnicity	
16 Year-Olds	1	Male	1	Black/ Afr Amer.	1	Non-Hispanic	1
		Grand Total	1	Grand Total	1	Grand Total	1

5-805 Motion for transfer Comparison

2016	2017
1 Motions	4 Motions

Calendar Year: 2017 Motion Type: 5-805 Motion for transfer

Agg. Robbery	1
Agg. Vehicular Hijacking	1
First Degree Murder	1
Theft of MV Parts or Accessor.	2

Age		Gender		Race		Ethnicity	
14 Year-Olds	1	Male	4	Black/ Afr Amer.	3	Hispanic	1
17 Year-Olds	3	Grand Total	4	Other	1	Non-Hispanic	3
				Grand Total	4	Grand Total	4

Total 5-805 Motion for Transfer: 5

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

St. Clair County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

Proceedings Continued

5-810 Extended Jurisdiction Comparison

2016	2017
5 Motions	7 Motions

Calendar Year: 2017 Motion Type: 5-810 Extended Jurisdiction

Agg. Poss. of Stolen Fir.	2
Agg. Robbery	1
Agg. Vehicular Hijacking	2
Armed Robbery	1
First Degree Murder	1

Age	
14 Year-Olds	2
15 Year-Olds	2
16 Year-Olds	3

Gender	
Male	7
Grand Total	7

Race	
Black/ Afr Amer.	7
Grand Total	7

Ethnicity	
Non-Hispanic	7
Grand Total	7

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.
NOTE: Cook County did not report data on 5-130 Excluded Jurisdiction (Automatic Transfers) motions.

Vermilion County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

Vermilion County All Motions Year Comparison

Calendar Year 2017 All Motions

 # Youth by Age

15 Year-Olds	1
17 Year-Olds	1
Youth Total	2

Age at Offense

15 Year-Olds	First Degree Murder	1
17 Year-Olds	Home Invasion	1

 # Charges by Age

15 Year-Olds	1
17 Year-Olds	1
Charges Total	2

Proceedings Summary

5-805 Motion for transfer Comparison

2016	2017
2 Motions	2 Motions

Calendar Year: 2017 Motion Type: 5-805 Motion for transfer

First Degree Murder	1
Home Invasion	1

Age

15 Year-Olds	1
17 Year-Olds	1

Gender

Female	1
Male	1
Grand Total	2

Race

Black/ Afr Amer.	2
Grand Total	2

Ethnicity

Non-Hispanic	2
Grand Total	2

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

Whiteside County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

Whiteside County All Motions Year Comparison

Calendar Year 2017 All Motions

# Youth by Age	
15 Year-Olds	2
Youth Total	2

Age at Offense		
15 Year-Olds	First Degree Murder	2

# Charges by Age	
15 Year-Olds	2
Charges Total	2

Proceedings Summary

5-805 Motion for transfer Comparison

2017
2 Motions

Calendar Year: 2017 Motion Type: 5-805 Motion for transfer

First Degree Murder	2

Age		Gender		Race		Ethnicity	
15 Year-Olds	2	Female	2	White	2	Non-Hispanic	2
		Grand Total	2	Grand Total	2	Grand Total	2

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

Will County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

Will County All Motions Year Comparison

Calendar Year 2017 All Motions

 # Youth by Age

17 Year-Olds	4
Youth Total	4

Age at Offense

17 Year-Olds	Armed Robbery	4

 # Charges by Age

17 Year-Olds	4
Charges Total	4

Proceedings Summary

5-805 Motion for transfer Comparison

2016	2017
1 Motions	4 Motions

Calendar Year: 2017 Motion Type: 5-805 Motion for transfer

Armed Robbery	4

Age		Gender		Race		Ethnicity	
17 Year-Olds	4	Male	4	Black/ Afr Amer.	4	Non-Hispanic	4
		Grand Total	4	Grand Total	4	Grand Total	4

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

Winnebago County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions

Calendar Year 2017

Winnebago County All Motions Year Comparison

Youth by Age

14 Year-Olds	1
15 Year-Olds	3
18 Year-Olds	1
Youth Total	5

Charges by Age

14 Year-Olds	1
15 Year-Olds	3
18 Year-Olds	1
Charges Total	5

Age at Offense

14 Year-Olds	Agg. Crim. Sex. Assault	1
15 Year-Olds	Agg. Crim. Sex. Assault	1
	Crim. Sexual Aslt.	1
	First Degree Murder	1
18 Year-Olds	Agg. Crim. Sex. Abuse	1

Proceedings Summary

5-130 Excluded Jurisdiction Comparison

2016	2017
6 Motions	2 Motions

Calendar Year: 2017 Motion Type: 5-130 Excluded Jurisdiction

Agg. Crim. Sex. Abuse	1
Agg. Crim. Sex. Assault	1

Age

15 Year-Olds	1
18 Year-Olds	1

Gender

Male	2
Grand Total	2

Race

Black/ Afr Amer.	1
White	1
Grand Total	2

Ethnicity

Non-Hispanic	2
Grand Total	2

5-805 Motion for transfer Comparison

2016	2017
3 Motions	2 Motions

Calendar Year: 2017 Motion Type: 5-805 Motion for transfer

Agg. Crim. Sex. Assault	1
First Degree Murder	1

Age

14 Year-Olds	1
15 Year-Olds	1

Gender

Male	2
Grand Total	2

Race

Black/ Afr Amer.	2
Grand Total	2

Ethnicity

Non-Hispanic	2
Grand Total	2

Total 5-805 Motion for Transfer: 2

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

Winnebago County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions

Calendar Year 2017

Proceedings Continued

5-810 Extended Jurisdiction Comparison

2016	2017
1 Motions	1 Motions

Calendar Year: 2017 Motion Type: 5-810 Extended Jurisdiction

Crim. Sexual Aslt.	1

Age		Gender		Race		Ethnicity	
15 Year-Olds	1	Male	1	Black/ Afr Amer.	1	Non-Hispanic	1
		Grand Total	1	Grand Total	1	Grand Total	1

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.
NOTE: Cook County did not report data on 5-130 Excluded Jurisdiction (Automatic Transfers) motions.

Woodford County

Proceedings to try youth as adults or apply Extended Juvenile Jurisdiction, Violent Juvenile Offender and/or Habitual Offender Provisions
Calendar Year 2017

Woodford County All Motions Year Comparison

Calendar Year 2017 All Motions

# Youth by Age	
15 Year-Olds	1
Youth Total	1

Age at Offense		
15 Year-Olds	Burglary	1

# Charges by Age	
15 Year-Olds	1
Charges Total	1

Proceedings Summary

5-805 Motion for transfer Comparison

2016	2017
1 Motions	1 Motions

Calendar Year: 2017 Motion Type: 5-805 Motion for transfer

Burglary	1

Age	
15 Year-Olds	1

Gender	
Male	1
Grand Total	1

Race	
Black/ Afr Amer.	1
Grand Total	1

Ethnicity	
Unknown	1
Grand Total	1

NOTE: Individual youth may be subject to multiple proceedings/charges. Therefore, the number of proceedings/charges may exceed the number of youth in some data tables.

Appendix A

This report summarizes five types of actions a State's Attorney may take to "transfer" a person under 18 years old to criminal (adult) court or to designate the youth as a "Violent Juvenile Offender" or "Habitual Juvenile Offender." This glossary provides a brief explanation of each of these action. These definitions should not be considered exhaustive. More information is available in the Illinois Juvenile Court Act of 1987 (705 ILCS 405/5 et seq.). As described in the introductory text, the Juvenile Court Act was updated in January 2016 with the enactment of Public Act 99-0258.

Glossary of Motion Types:

Excluded Jurisdiction (705 ILCS 405/5-130): This section of the Juvenile Court Act provides that, if a youth more than 16 years old is charged with one of three specified offenses, their case is automatically "excluded" from juvenile court and shall be prosecuted under the criminal code. This is often referred to as "automatic transfer." The specified offenses are first degree murder, aggravated criminal sexual assault or aggravated battery with a firearm when the youth is accused of personally discharging a firearm. If convicted or a plea of guilty is filed, the Court shall impose a criminal sentence in accordance with Section 5-4.5-105 of the Unified Code of Corrections.

Motion for Transfer (705 ILCS 405/5-805): There are two types of motions for transfer: Presumptive Transfer and Discretionary Transfer.

1. A presumptive transfer motion alleges a youth 15 years of age or older committed an act that constitutes a forcible felony and (i) the youth has previously been adjudicated delinquent or found guilty for commission of an act that constitutes a forcible felony and (ii) the act that constitutes the offense was committed in furtherance of criminal activity by an organized gang. If a juvenile judge finds probable cause to believe that these allegations are true, there is a rebuttable presumption that the youth should transferred to the adult criminal court.
2. A discretionary transfer motion alleges a youth 13 years of age or older committed an act that constitutes a crime under the criminal laws of Illinois. If a juvenile judge finds probable cause to believe that these allegations are true and that it is "not in the best interests of the public" to proceed in juvenile court, the court may transfer the case to adult criminal court.

Extended Jurisdiction (705 ILCS 405/5-810): This petition alleges the commission by a youth 13 years of age or older of any offense which would be a felony if committed by an adult. Upon a disposition of guilt or guilty plea the court shall impose a juvenile sentence and an adult criminal sentence in accordance with Section 5-4.5-105 of the Unified Code of Corrections. The execution of the adult criminal sentence shall be stayed on the condition that the youth not violate the provisions of the juvenile sentence. These motions are often referred to as "EJJs." If a motion for EJJ is granted, the youth has a right to a jury trial and, if convicted, the sentencing proceedings are open to the public.

Violent Offender (705 ILCS 405/5-820): A youth having been previously adjudicated a delinquent minor for an offense, which had the youth been prosecuted as an adult, would have been a Class 2 or greater felony involving the use or threat of physical force or violent against an individual or Class 2 or greater felony for which an element of the offense is possession of use of a firearm, and who is thereafter adjudicated a delinquent minor for the second time for any of those offenses shall be adjudicated a

Violent Juvenile Offender (VJO). Upon a VJO adjudication, a court "shall" commit the youth to the Department of Juvenile Justice until the youth's 21st birthday.

Habitual Offender (705 ILCS 405/5-850): Any youth having been twice adjudicated a delinquent minor for offenses, which had the youth been prosecuted as an adult, would have been felonies under the laws of Illinois, and who is thereafter adjudicated a delinquent minor for a third time shall be adjudged an Habitual Juvenile Offender (HJO). Upon an HJO adjudication, the court "shall" commit the youth to the Department of Juvenile Justice until the youth's 21st birthday.

No. 126116

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- DENZAL STEWART, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-18-0014. There on appeal from the Circuit Court of Cook County, Illinois , No. 16 CR 60199. Honorable Joseph M. Claps, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, aagKatherineDoersch@gmail.com;

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602, eserve.criminalappeals@cookcountyil.gov;

Mr. Denzal Stewart, Reg # 31395-509, MCC Chicago, Metropolitan Correctional Center, 71 West Van Buren Street, Chicago, IL 60605

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 November 24, 2021, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in Chicago, 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/Alicia Corona
LEGAL SECRETARY
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email is accepted at
1stdistrict.eserve@osad.state.il.us