

No. 130191

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of
	)	Illinois, No. 4-23-0087.
Plaintiff-Appellee,)	
	)	There on appeal from the Circuit
-vs-	)	Court of the Eleventh Judicial Circuit,
	)	Logan County, Illinois, No. 18-CF-200.
)	
RYANN N. JOHNSON,	)	Honorable
	)	Thomas W. Funk,
Defendant-Appellant.)	Judge Presiding.
)	

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ARGUMENT

Where the consideration of an improper factor in aggravation at sentencing affects a defendant's fundamental right to liberty, the trial court's consideration of improper sentencing factors should be subject to plain error review under the second prong of the plain error rule.

In his opening brief, Mr. Johnson argued that the Fourth District erred where, after finding that the trial court considered an improper factor in aggravation at sentencing, it determined that the court's error was not subject to plain error review under the second prong of the plain error rule. (Def. Op. Br., p. 10-19) This Court established a principle in *People v. Martin*, 119 Ill.2d 453, 458 (1988)¹, that the consideration of an improper sentencing factor affects a defendant's fundamental right to liberty, and impinges on the right not to be sentenced based on improper factors. In the three decades since *Martin*, the First, Second, Third, and Fifth Districts of the Appellate Court have similarly found that the circuit court's improper consideration of a factor in aggravation can be reviewed under the second prong of the plain error doctrine because it affects the defendant's fundamental right to liberty. *See infra*. Accordingly, the precedent of this Court, coupled with the long-standing practice of Illinois reviewing courts invoking plain error in this situation, demonstrates the incorrectness of the Fourth District's holding. Therefore, this Court should find that Johnson's argument can be reviewed under the second prong of the plain error rule and, because the weight placed on the improper sentencing factor was not insignificant, vacate Johnson's sentence and remand the case for re-sentencing free of the consideration

¹Appellate counsel acknowledges that the purported quote to *People v. Martin* found on page 10 and 12 of the defendant's opening brief is not an exact quote from this Court's opinion in *Martin*. Rather, the quote is from the First District's opinion in *People v. Haley*, 2011 IL App (1st) 093585, ¶ 61, where the appellate court, citing *Martin*, summarized this Court's finding in *Martin*. Counsel did not intend any confusion.

of improper aggravating factors.

A. The trial court considered an improper factor in aggravation at ~~sentencing~~

First, the State contends that the trial court did not err by considering in aggravation that Mr. Johnson held a position of trust in relation to the victim. (St. Br., p. 14-18) The State maintains that the trial court “properly considered the nature of defendant’s relationship with Lacey – including that they had a child together – as it was part of the circumstances of the assault.” (St. Br., p. 16) According to the State, the fact the trial court “mistakenly labeled an applicable non-statutory aggravating factor as an inapplicable statutory aggravating factor does not rise to the level of clear or obvious error.” (St. Br., p. 18) This Court should reject the State’s argument as the record contradicts it.

In 730 ILCS 5/5-5-3.2 (2022), the legislature listed several statutory factors in aggravation that a trial judge may consider when deciding whether to impose a more severe sentence. One of these factors is that the defendant held a position of trust or supervision in relation to a victim who is under 18 years of age, and committed one of the various sex-related offenses enumerated in the statute against the victim. 730 ILCS 5/5-5-3.2(a)(14). As such, the legislature explicitly limited the application of this statutory factor to cases where the defendant has been convicted of one of the listed sex-related offenses and the victim was under the age of 18. Here, neither of those facts are present. Indeed, the sole offense for which Johnson was convicted was aggravated domestic battery. Aggravated domestic battery is not one of the enumerated offenses. *See* 730 ILCS 5/5-5-3.2(a)(14). Additionally, at the time of the offense, the victim in this case was about 26 years old, well over 18 years of age. (R. 562) Therefore, this statutory factor cannot apply in Johnson’s case.

Importantly, the appellate court has already determined that the trial court erred in considering, in aggravation of Johnson's sentence, that he held a position of trust over the victim. *People v. Johnson*, 2023 IL App (4th) 230087-U, ¶¶ 49-50. In the appellate court, the State argued that the trial court was referring to Johnson's daughter when it stated that he held a position of trust. However, the Fourth District rejected this argument, noting that the State referenced the "position of trust" statutory subsection in arguing that the aggravating factor applied and pointing out that the trial court mirrored the same statutory factors identified by the State. *Johnson*, 2023 IL App (4th) 230087-U, ¶ 49.

Similarly, this Court should reject the State's claim that the trial court mistakenly labeled an applicable non-statutory aggravating factor as an inapplicable statutory aggravating factor. Contrary to the State's assertions, the record does not reveal that the trial court was solely considering the fact that Johnson had a child with the victim. To the extent that the court referenced the fact that Johnson had a child with the victim, it was regarding the court's belief that the position of trust statutory factor applied to Johnson's case. Indeed, at sentencing, the State specifically cited the statutory subsection for the position of trust factor in arguing that it applied to Johnson. (R. 897) In announcing the sentence, the trial court recited the five statutory factors identified by the State, explicitly finding that the position of trust factor applied. (R. 910) Therefore, the record clearly shows that the trial judge improperly aggravated Johnson's sentence based partly on a statutory factor that could not apply to Johnson's case. As the appellate court has already recognized, this was error.

Moreover, contrary to the State's claims, no evidence suggested that Johnson had any position of trust or supervision over the victim. Sutheard was not Johnson's

child but was his adult ex-girlfriend. Johnson did not live with Sutheard at the time of the offense or in the years leading up to the offense. (R. 562, 595-596) And there was no indication that Sutheard entrusted Johnson with any aspect of her life. Thus, in addition to the fact that this statutory factor does not apply in this case, the evidence also does not support the conclusion that Johnson generally had any position of trust or supervision over Sutheard.

Therefore, because the legislature limited the scope of this aggravating factor and it does not apply to cases involving the aggravated domestic battery of an adult victim, it was patently improper for the judge to consider this factor in aggravation where Johnson was being sentenced for the aggravated domestic battery of an adult victim. As such, this Court should reject the State's argument and reaffirm the appellate court's finding that the trial judge erred in considering this statutory factor at sentencing.

B. The Trial Court Committed Second-Prong Plain Error

At the outset, the State acknowledges that this Court, in *People v. Martin*, found that the trial judge's consideration of an improper sentencing factor "clearly affected the defendant's fundamental right to liberty" and "impinged on her right not to be sentenced based on improper factors." (St. Br., p. 22-24) The State also does not dispute that Illinois courts have repeatedly held that the consideration of improper factors at sentencing amounts to second-prong plain error. (St. Br., p. 22-24) Indeed, the First, Second, Third, and Fifth Districts of the Appellate Court have long determined that a sentencing court's improper consideration of a factor in aggravation can be reviewed under the second prong of the plain error doctrine because it affects the defendant's fundamental right to liberty. *See People v. Haley*, 2011 IL App (1st) 093585, ¶ 62; *People v. Whitney*, 297 Ill.App.3d 965, 969 (1st Dist. 1998); *People v. Abdelhadi*, 2012 IL App

(2d) 111053, ¶ 7; *People v. Pierce*, 223 Ill.App.3d 423, 441 (2d Dist. 1991); *People v. Young*, 2022 IL App (3d) 190015, ¶ 23; *People v. Larson*, 2022 IL App (3d) 190482, ¶ 32; *People v. Sanders*, 2016 IL App (3d) 130511, ¶ 17; *People v. Dempsey*, 242 Ill.App.3d 568, 597-598 (5th Dist. 1993); *People v. Joe*, 207 Ill.App.3d 1079, 1085 (5th Dist. 1991).

Yet, the State urges this Court to abandon its pronouncement in *People v. Martin*, overturn over three decades of appellate court precedent, and hold that the trial court's consideration of an improper factor in aggravation at sentencing is not cognizable as second-prong plain error. (St. Br., p. 22-24)

1. This Court should not abandon its pronouncement in *People v. Martin* and overturn over thirty-years of Illinois precedent.

Initially, the State asserts that this Court should overrule every appellate court case that holds that a sentencing court's consideration of an inapplicable factor in aggravation constitutes second-prong plain error because the State claims that every decision over the past thirty years has been based on a misunderstanding of this Court's decision in *People v. Martin*, 119 Ill.2d 453 (1988). (St. Br., p. 22-24) The State does not allege that appellate courts have incorrectly quoted this Court's finding in *Martin* that the consideration of improper sentencing factors affects a defendant's fundamental right to liberty. Instead, the State suggests this Court's pronouncement in *Martin* that the consideration of inapplicable sentencing factors "clearly affected the defendant's fundamental right to liberty" and "impinged on her right not to be sentenced based on improper factors" should be afforded little weight because it was merely a "passing observation" and was not an integral part of the opinion. (St. Br., p. 23-24) This Court should reject the State's attempt to minimize the significance of this Court's opinion in *Martin* and deny the State's request to eliminate the decades-old principle of law that the consideration of improper sentencing factors is reviewable under the second

prong of the plain error doctrine.

In *Martin*, the issue before this Court was whether the trial court erred by considering an improper factor in aggravation of the defendant's sentence. 119 Ill.2d at 455. On appeal, the State maintained that the defendant waived this sentencing issue by failing to raise the issue before the trial court or the appellate court. 119 Ill.2d at 458. In addressing the State's waiver argument, this Court stated:

Although the general rule in Illinois is that failure by a defendant to object at trial or to raise an issue in the appellate court constitutes a waiver, it 'is well established that in the interest of justice, a reviewing court may consider *all* questions which appear to be plain error or affect substantial rights of a party.'

Martin, 119 Ill.2d at 458 (citing *People v. Henderson*, 119 Ill.App.2d 403, 405 (1st Dist. 1970); Ill. S. Ct. Rule 615).

After identifying the two instances where waiver will not be found, this Court addressed both instances in turn. First, this Court found that the consideration of an improper sentencing factor affects the substantial rights of a defendant. *Martin*, 119 Ill.2d at 458-459. Specifically, this Court stated:

The trial judge's consideration of the fact that the defendant's conduct caused serious harm to [the victim], resulting in his death, as a factor in aggravation in sentencing clearly affected the defendant's fundamental right to liberty (see *Ingraham v. White*, 430 U.S. 651, 673-74 (1977)) and impinged on her right not to be sentenced based on improper factors (see *People v. Conover*, 84 Ill.2d 400, 405 (1981) (sentence based on improper factors will not be affirmed unless the court can determine from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence)).

Martin, 119 Ill.2d at 458-460. Notably, in support of the finding that this sentencing error affects a defendant's fundamental right to liberty, this Court cited the portion of the opinion in *Ingraham v. Wright*, where our Supreme Court discussed the historic

right to liberty, stating that “[i]t is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law.” *Wright*, 430 U.S. 651, 674 (1977). Similarly, this Court cited the Court’s earlier decision in *People v. Conover*, 84 Ill.2d 400 (1981), in support of the assertion that a defendant has a right not to be sentenced based on improper factors. *Martin*, 119 Ill.2d at 458.

After finding that the alleged sentencing error affects a defendant’s substantial rights, this Court addressed the closely-balanced prong of plain error review. *Martin*, 119 Ill.2d at 458-459. This Court reviewed the sentencing evidence and determined that it was appropriate to apply the first prong of the plain error rule because the “evidence at the sentencing hearing weighed heavily in the defendant’s favor.” 119 Ill.2d at 459. Importantly, after determining that the sentencing error constituted first-prong plain error, this Court concluded its discussion of waiver indicating that “[w]e conclude that the trial court in the instant case committed a clear error that *affected substantial rights of the defendant*.” 119 Ill.2d at 460 (emphasis added).

Accordingly, the *Martin* opinion makes clear that, contrary to the State’s claim, this Court did more than make a “passing observation” that the sentencing court’s consideration of an inapplicable factor in aggravation implicates a defendant’s fundamental right to liberty. (St. Br., p. 22-23) Indeed, rather than make this statement in the context of first-prong plain error analysis as the State claims, this Court in *Martin* opined that the sentencing error affected the defendant’s substantial rights *before* this Court ever discussed first-prong plain error. 119 Ill.2d at 458-460. Notably, this Court not only indicated that the sentencing error affected the substantial rights of the defendant, but it went on to identify precisely what fundamental rights were affected and cited authority to support the Court’s assertion that the defendant had a fundamental

right to liberty, and a right not to be sentenced based on improper factors. 119 Ill.2d at 458-460. As such, where this Court provided a cogent and complete analysis of why the alleged sentencing error is reviewable under second-prong plain error before even addressing first-prong plain error, it cannot be said that this Court's discussion was merely a passing observation made in the context of assessing whether the sentencing error was first-prong plain error.

Moreover, the *Martin* Court's statement that "[w]e conclude that the trial court in the instant case committed a clear error that affected substantial rights of the defendant" is at odds with the State's position that this Court's pronouncement that consideration of the inapplicable sentencing factor affected the defendant's right to liberty was *obiter dictum*. (St. Br., p. 24); *Martin*, 119 Ill.2d at 460. After this Court determined that the sentencing error affected the defendant's fundamental right to liberty, the Court conducted a first-prong plain error analysis. As the State notes, after finding that the sentencing evidence was closely balanced, this Court determined that applying the first prong of the plain error rule was appropriate.

However, the State fails to recognize that, after finding that the first prong of the plain error rule applied, the *Martin* Court concluded its waiver analysis by stating that "[w]e conclude that the trial court in the instant case committed a clear error that *affected substantial rights of the defendant*." *Martin*, 119 Ill.2d at 460 (emphasis added). Indeed, despite conducting a first-prong analysis and determining that the evidence was closely balanced, the *Martin* Court returned to its earlier discussion of second-prong plain error, concluding that the error "affected substantial rights of the defendant." 119 Ill.2d at 460; *see People v. Moon*, 2022 IL 125595, ¶ 24 (noting that second-prong plain error is the "substantial rights prong"). As such, a reasonable interpretation of the *Martin* Court's holding would be that, after finding that both prongs

of the plain error rule applied, this Court found that the issue was not waived because the sentencing error “affected substantial rights of the defendant.” 119 Ill.2d at 460. In this scenario, it cannot be said that the *Martin* Court’s finding that the consideration of improper sentencing factors affects a defendant’s fundamental right to liberty is *dicta*, as the State suggests. (St. Br., p. 22-24) Rather, the Court was clear in that this type of error could be considered under both prongs, which is exactly what it did in its analysis.

Even if this Court were to agree with the State’s characterization of the holding in *Martin*, the *Martin* Court’s finding that the improper consideration of sentencing factors constitutes second-prong plain error should be deemed judicial *dictum*. This Court has observed the distinctions between *obiter dictum* and judicial *dictum*. See *People v. Grever*, 222 Ill.2d 321, 336-338 (2006). “*Obiter dictum*” is a remark or opinion that a court uttered as an aside. *Lebron v. Gottlieb Memorial Hosp.*, 237 Ill.2d 217 (2010). *Obiter dictum* is “not essential to the outcome of the case, is not an integral part of the opinion, and thus is not binding authority or precedent within the *stare decisis* rule.” *People v. Lighthart*, 2023 IL 128398, ¶ 50. “In contrast, ‘an expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the cause, if *dictum*, is a judicial *dictum*. [A] judicial *dictum* is entitled to much weight, and should be followed unless found to be erroneous.’” *Lebron*, 237 Ill.2d at 236-237 (citations and quotations omitted).

As discussed above, the *Martin* Court did not merely reference that the consideration of improper sentencing factors affects a defendant’s fundamental right to liberty as an aside. Instead, the Court provided a cogent and complete analysis, with citations to the relevant authority, for why the sentencing error affected the defendant’s substantial rights. Additionally, the opinion in *Martin* reveals that the waiver issue

was briefed by the State, and to the extent that the Court resolved the issue under the first prong of the plain error doctrine, it then deliberately passed upon the second-prong plain error question. Furthermore, if this Court agrees that the *Martin* Court found the sentencing error reviewable under both prongs of plain error review, such finding would preclude this Court's language in *Martin* from being relegated to the category of *obiter dictum*. See *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*"). As such, if this Court's finding regarding the second-prong plain error in *Martin* was *dicta*, this Court should find that it was judicial *dictum* and thus, it should be afforded much weight and should be followed. See *People v. Williams*, 204 Ill.2d 191, 206 (2003) ("Judicial *dicta* have the force of a determination by a reviewing court and should receive dispositive weight in an inferior court.").

However, even if this Court agrees with the State's characterization of *Martin's dictum*, such a characterization in no way refutes the principle of law espoused by this Court in *Martin* that the consideration of improper sentencing factors affects a defendant's right to liberty. See *Cates v. Cates*, 156 Ill.2d 76, 80 (1993) ("*obiter dicta* of a court of last resort can be tantamount to a decision and therefore binding in the absence of a contrary decision of that court"). Nor does it invalidate the over three decades of appellate court precedent in which appellate courts have held that the consideration of improper sentencing factors constitutes second-prong plain error.

Contrary to the State's claims, this appellate court precedent is not based on a "misreading" or "misunderstanding" of this Court's opinion in *Martin*. (St. Br., p. 22-24) Whether it is the holding, *obiter dictum*, or judicial *dictum*, the fact remains that this Court in *Martin* found that the consideration of improper sentencing factors affects the substantial rights of the defendant and a defendant's fundamental right

to liberty. *Martin*, 119 Ill.2d 458-460. After this Court made this finding in *Martin*, the First, Second, Third, and Fifth Districts of the Appellate Court have continually adhered to this now decades-old principle of law. The fact that this principle of law may not have been the specific holding of the Court in *Martin* is not an adequate justification for accepting the State's request to overturn every single appellate court decision that has held that the consideration of improper sentencing factors constitutes second-prong plain error. Accordingly, because the State has failed to provide the necessary special justification for departing from *stare decisis*, this Court should reject the State's invitation to upset such well-established precedent of Illinois courts. *See People v. Colon*, 225 Ill.2d 125, 146 (2007).

2. The consideration of improper factors at sentencing is a constitutional error that undermines the integrity of the judicial process.

Next, the State argues that the sentencing court's consideration of an inapplicable aggravating factor is not a constitutional error that undermines the integrity of the judicial process. (St. Br., p. 19-20) The State maintains that a defendant has "no fundamental constitutional right to have a sentencing court consider (or not consider) the particular facts of his case under the statutory label 'position of trust.'" (St. Br., p. 19) The State also alleges that even if a sentencing court's consideration of an inapplicable statutory factor were a fundamental constitutional error, "it would not be structural error because it does not undermine the integrity of the judicial process." (St. Br., p. 19-20) This Court should reject the State's attempt to restrict the application of the plain error rule.

As an initial matter, it is unclear how the aggravation of a defendant's sentence based on improper sentencing factors does not affect the framework within which the sentencing process proceeds. The sentencing court's reliance on an improper sentencing

factor in aggravation of Johnson's sentence fundamentally altered the framework of the sentencing hearing. This was not simply an error in the sentencing process itself but rather an error that deprived Johnson of a fair sentencing hearing and affected his right to liberty. The "integrity of the judicial process" hinges almost entirely on whether the restriction of liberty is deemed fair or just. In fact, the imposition of a sentence of incarceration is arguably the most important step in a criminal conviction—it is the point at which an individual's right to liberty is stripped—and that is why all the courts in this State, save for the Fourth District, hold that is plain error to consider improper sentencing factors. And for good reason, as it could never be said that a defendant's liberty was fairly or justly restricted when such restriction is based on the consideration of an improper sentencing factor. Therefore, the State's claim that the sentencing error does not affect the framework within which the sentencing process proceeds is unavailing.

The plain error doctrine stems from Illinois Supreme Court Rule 615(a), which provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." *People v. Herron*, 215 Ill.2d 167, 176 (2005). In the sentencing context, to establish plain error, a defendant must show either that: "(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).

Consistent with the principle of law espoused in *Martin* that a trial judge's consideration of an improper factor in aggravation in sentencing "clearly affected the defendant's fundamental right to liberty" and "impinged on her right not to be sentenced based on improper factors," Illinois courts have held that the consideration of improper factors at sentencing amounts to a constitutional error cognizable under second-prong

plain error. *See Abdelhadi*, 2012 IL App (2d) 111053, ¶ 7; *Pierce*, 223 Ill.App.3d at 441; *Larson*, 2022 IL App (3d) 190482, ¶ 32; *People v. Cohn*, 2014 IL App (3d) 120910, ¶¶ 28-30; *Whitney*, 297 Ill.App.3d at 969; *People v. Hughes*, 259 Ill.App.3d 172, 179 (1st Dist. 1994).

As the aforementioned cases recognize, a claim that the sentencing court considered improper sentencing factors in aggravating a defendant's sentence alleges a fundamental constitutional error, as it affects the defendant's fundamental right to liberty.

Additionally, it is well-established that the right to be sentenced lawfully is substantial because it affects a defendant's fundamental right to liberty. *See People v. Baaree*, 315 Ill.App.3d 1049, 1050 (1st Dist. 2000); *People v. Burrage*, 269 Ill.App.3d 67, 71 (1st Dist. 1994); *People v. Lindsay*, 247 Ill.App.3d 518, 527 (2d. Dist. 1993); *People v. Kopezick*, 312 Ill.App.3d 843, 852 (3d. Dist. 2000). This Court has made clear that "in the interest of justice, a reviewing court may consider *all* questions which appear to be plain error *or affect substantial rights of a party*," and it is undeniable that the error here affected Johnson's substantial rights, as his loss of liberty was based in part on an improper sentencing factor. *Martin*, 119 Ill.2d at 458 (emphasis added) (citations omitted). Accordingly, this Court should reject the State's claim that the consideration of improper sentencing factors in aggravation of Johnson's sentence did not rise to the level of "fundamental constitutional error." (St. Br., p. 19-20)

Finally, the State relies on this Court's decisions equating second-prong plain error to structural error in arguing that the error at issue here is not cognizable as second-prong plain error. (St. Br., p. 19-20) However, the State fails to recognize that in *People v. Clark*, 2016 IL 118845, ¶ 46, this Court expressly rejected the notion that second-prong plain errors are restricted to the limited class of errors that have been

deemed “structural.” Instead, the emphasis must remain on fundamental fairness and the integrity of the judicial process. *Clark*, 2016 IL 118845, ¶ 44 (“The next question is whether that error is so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process.”); *see also People v. Lewis*, 234 Ill.2d 32, 47 (2009) (“The foundation of plain-error review is fundamental fairness.”). Indeed, as this Court recognized in *People v. Jackson*, 2022 IL 127256, ¶ 30, a case on which the State relies, this Court “may find an error to be structural as a matter of state law independent from the categories of errors identified by the Supreme Court.” Therefore, this Court should reaffirm that a sentencing judge’s consideration of improper sentencing factors in aggravating a defendant’s sentence constitutes a constitutional error that undermines the integrity of the judicial process.

3. The consideration of improper factors at sentencing is not subject to a harmless error analysis such that it cannot be structural error.

The State also maintains that the claim that a sentencing court considered an improper sentencing factor is subject to harmless error analysis and, therefore, cannot be a structural error. (St. Br., p. 20-22) The State cites this Court’s decision in *People v. Bourke*, where this Court held that re-sentencing was not required “where it can be determined from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence.” *Bourke*, 96 Ill.2d 327, 332 (1983). The State concludes that pursuant to *Bourke*, the asserted error in the instant case is subject to harmless error analysis, and therefore, the second prong of the plain-error rule does not apply. (St. Br., p. 20-22)

As an initial matter, the State’s claim that Johnson failed to acknowledge the holding in *Bourke* is incorrect. (St. Br., p. 21) In Johnson’s opening brief, he explained that “[a] sentence based on an improper factor must be vacated unless the reviewing

court can determine that the weight placed on the improper factor was an insignificant element of the defendant's sentence." (Def. Op. Br., p. 17) (citing *People v. Heider*, 231 Ill.2d 1, 21-22 (2008)). Furthermore, the State's claim that Johnson has failed to provide the necessary special justification for departing from *stare decisis* is misguided. (St. Br., p. 21) Johnson does not ask this Court to depart from the well-established precedent that the consideration of an improper sentencing factor is cognizable under the second prong of the plain error rule. Rather, it is the State that is asking this Court to eliminate this decades-old principle of law and overrule over thirty years of appellate court precedent.

Turning to the merits, the State's claim that the court's consideration of improper sentencing factors is subject to a harmless error analysis is misguided. This Court has held that to obtain relief under the plain-error rule, a defendant must first show that reversible error occurred. *People v. Naylor*, 229 Ill.2d 584, 602 (2008). If the error complained of is not reversible, a reviewing court need not go any further because, without a reversible error, the defendant cannot invoke the plain-error rule. *Naylor*, 229 Ill.2d at 602. On the other hand, if reversible error is identified, the defendant may obtain relief if the error complained of meets either prong of the two-pronged plain-error rule. 229 Ill.2d at 602.

When a sentencing judge considers improper sentencing factors, it is a reversible error unless "it can be determined from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence[.]" *Bourke*, 96 Ill.2d at 332. Indeed, "it is reversible error for a sentencing judge to not merely mention, but rely on, an improper aggravating factor in sentencing[.]" *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 17. Where a reviewing court is unable to determine the weight given to an improperly considered factor, the cause

must be remanded for re-sentencing. *Bourke*, 96 Ill2d at 332.

Accordingly, rather than a harmless error analysis, the reviewing court's review of the weight placed on the factor goes solely toward the determination of whether error occurred. Consistent with second-prong plain error analysis, if the reviewing court determines that the sentencing judge erred by relying on an improper aggravating sentencing factor, the judge's error constitutes second-prong plain error and requires remand for re-sentencing regardless of whether the sentencing evidence was closely balanced or not. This is because a sentence based in part on the consideration of improper sentencing factors "clearly" affects a defendant's fundamental right to liberty and is thus subject to second-prong plain error review. *Martin*, 119 Ill.2d at 458. In contrast, if the reviewing court can determine that the judge did not rely on an improper factor (e.g. insignificant weight), then no error occurred, which necessarily negates the possibility of "harmless error."

Furthermore, it is important to note that when this Court issued its opinion in *Martin*, *Bourke* had already been decided. Indeed, this Court in *Martin* cited *Bourke* and conducted the *Bourke* analysis to determine whether a reversible error had occurred. *Martin*, 119 Ill.2d at 461-463. Yet, despite conducting the required *Bourke* analysis, this Court in *Martin* still found that the consideration of improper sentencing factors was reviewable under either prong of the plain error doctrine, as it affected a defendant's fundamental right to liberty and right not to be sentenced based on improper factors. *Martin*, 119 Ill.2d at 458. Therefore, this Court should reject the State's claim that the consideration of improper sentencing factors cannot be structural error.

As an aside, in the event that this Court believes that the *Bourke* analysis is incompatible with second-prong plain error, there is some support for the position that the consideration of an improper sentencing factor, alone, requires a new sentencing

hearing without addressing the weight placed on the sentence. Indeed, Justice Hutchinson of the Illinois Appellate Court, Second District, has observed that, due to the need to “ensure fundamental fairness” and to “safeguard the integrity of the judicial process,” reviewing courts should hold that a circuit court’s consideration of an improper aggravating factor itself “require[s]” a new sentencing hearing, without addressing whether the circuit court’s consideration of the improper factor “influenced its determination of the sentence.” *People v. Johnson*, 2017 IL App (2d) 141241, ¶¶ 74-76 (Hutchinson, J., concurring in part and dissenting in part) (citing *Sanders*, 2016 IL App (3d) 1305111, ¶ 17); *see also Abdelhadi*, 2012 IL App (2d) 111053, ¶ 3 (finding that a new sentencing hearing was required where the trial court’s comments did not demonstrate how much weight was placed on the improper factor and the defendant received a 10-year prison term after facing a sentencing range of 6 to 60 years).

In sum, this Court has stated that “[t]he foundation of plain-error review is fundamental fairness.” *Lewis*, 234 Ill.2d at 47 (citing *Herron*, 215 Ill.2d at 177; *People v. Keene*, 169 Ill.2d 1, 17 (1995)). The fundamental right to liberty is arguably the most important right, and any denial of that right based on improper sentencing factors should be reviewable in a court of review. This Court has recognized that considering improper sentencing factors affects a defendant’s fundamental right to liberty, which is a substantial right of the defendant. Similarly, reviewing courts in the First, Second, Third, and Fifth appellate districts have found that considering improper sentencing factors is reviewable under the second prong of the plain error rule. Yet, citizens from the Fourth District are foreclosed from arguing that the trial court’s consideration of improper factors at sentencing triggers second-prong plain error review. That is fundamentally unfair. Therefore, this Court should hold that Johnson’s argument can be reviewed under the second prong of the plain error rule.

C. Johnson's arguments are not incompatible with a claim of second-prong plain error.

Finally, the State claims that Johnson's argument regarding the evidence presented at the sentencing hearing is incompatible with second-prong plain error review. (St. Br., p. 24-28) However, the State seemingly misapprehends Johnson's argument. Johnson does not present an argument regarding first-prong plain error as the State suggests. Instead, Johnson argues that the trial court's consideration of improper sentencing factors was a reversible error because the weight placed on the improper factor was not insignificant. (Def. Op. Br., p. 17-19) As discussed above, this Court conducted this same analysis in *Martin* despite also finding that the consideration of improper sentencing factors was reviewable under both prongs of the plain error doctrine. Therefore, the State's claim that Johnson's argument is incompatible with second-prong plain error review should be rejected as it departs from the precedent of this Court and that of the First, Second, Third, and Fifth Districts of the Appellate Court.

Importantly, because the appellate court determined that the alleged sentencing error cannot constitute second-prong plain error, the court never addressed whether reversible error occurred. However, because the record on appeal is sufficient for this Court to determine that the weight placed on the improper sentencing factor was not insignificant, this Court should remand the case directly to the trial court for a new sentencing hearing free from the consideration of the improper sentencing factor. *See People v. Cregan*, 2014 IL 113600, ¶ 18 (considering unpreserved constitutional claim where waiting for a later proceeding would not be "in the interest of judicial economy").

Accordingly, because it cannot be said that the weight placed on the improper factor was insignificant, this Court should not only find that Johnson's argument is reviewable under the second prong of the plain error rule but also vacate Johnson's

sentence and remand for re-sentencing free from the consideration of the improper aggravating factor.

CONCLUSION

For the foregoing reasons, Ryann N. Johnson, respectfully requests that this Court review Mr. Johnson's argument as plain error, vacate his sentence, and remand the case to the circuit court for a new sentencing hearing. Alternatively, Mr. Johnson respectfully requests that this Court remand the cause to the appellate court with direction that the appellate court review Mr. Johnson's argument as plain error.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages contained in the Rule 341(d) cover and the certificate of service, is 20 pages.

/s/Zachary Wallace
ZACHARY WALLACE
Assistant Appellate Defender

No. 130191

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of
	)	Illinois, No. 4-23-0087.
Plaintiff-Appellee,)	
	)	There on appeal from the Circuit
-vs-	)	Court of the Eleventh Judicial Circuit,
	)	Logan County, Illinois, No. 18-CF-200.
)	
RYANN N. JOHNSON,	)	Honorable
)	Thomas W. Funk,
Defendant-Appellant.)	Judge Presiding.
)	

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On June 26, 2024, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the appellant in an envelope deposited in a U.S. mail box in Elgin, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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CYNTHIA A. GRANT
SUPREME COURT CLERK

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