No. 128474

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 3-19-0154.
Plaintiff-Appellant,	)	There on appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 17 CF 1812.
-vs-	)	
BRYAN N. BRUSAW,	)	Honorable Sarah F. Jones,
Defendant-Appellee.	)	Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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ISSUES PRESENTED FOR REVIEW

I. Whether this Honorable Court should affirm the Appellate Court's order reversing and remanding the judgment of the circuit court because a motion under Section 114-5(a) involves a personal right belonging to the defendant, is self-executing, and is not subject to procedural default.

II. Whether this Honorable Court should reduce Bryan Brusaw's sentence for felony driving while license revoked to the maximum non-extended term of three years.

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STATUTE INVOLVED

725 ILCS 5/114-5(a) (2017)

Within 10 days after a cause involving only one defendant has been placed on the trial call of a judge the defendant may move the court in writing for a substitution of that judge on the ground that such judge is so prejudiced against him that he cannot receive a fair trial. Upon the filing of such a motion the court shall proceed no further in the cause but shall transfer it to another judge not named in the motion. The defendant may name only one judge as prejudiced, pursuant to this subsection; provided, however, that in a case in which the offense charged is a Class X felony or may be punished by death or life imprisonment, the defendant may name two judges as prejudiced.

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STATEMENT OF FACTS

Any facts in addition to those described in the State's brief that are necessary for an understanding of the issues presented in this appeal will be included, together with appropriate record references, in the argument portion of this brief.

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ARGUMENT

I. This Honorable Court should affirm the Appellate Court's order reversing and remanding the judgment of the circuit court because a motion under Section 114-5(a) involves a personal right belonging to the defendant, is self-executing, and is not subject to procedural default.

The Appellate Court was correct to reverse and remand defendant Bryan Brusaw's convictions of aggravated driving under the influence and felony driving while license revoked (see C180). *People v. Brusaw*, 2022 IL App (3d) 190154-U, ¶¶ 2, 18. Section 114-5(a) of the Code of Criminal Procedure [725 ILCS 5/114-5(a) (2017)] provides a defendant an absolute right to substitute judges. A motion under that Section is self-executing, and actions taken by the trial court while such a motion are pending, or after such a motion is improperly denied, are nullities. Because Brusaw filed a proper motion under Section 114-5(a), and because the trial court failed to "proceed no further," his convictions cannot stand. This Honorable Court should therefore affirm the Appellate Court's order reversing and remanding the judgment of the trial court.

Standard of Review

The State frames this issue as a question of law, to be reviewed *de novo*, involving acquiescence, forfeiture, and plain error (St. Br. 8). Brusaw agrees that this case presents a question of law reviewed *de novo*, but this is because the issue is one of statutory interpretation. *People v. Tate*, 2016 IL App (1st) 140598, ¶ 13.

Section 114-5(a)

The primary rule of statutory interpretation "is to ascertain and give effect to the intent of the legislature." *In re M.M.*, 2016 IL 119932, ¶ 16. The language of the statute, which should be given its plain and ordinary meaning, is the best evidence of legislative intent. *People v. McClure*, 218 Ill. 2d 375, 382 (2006). "A

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statute is viewed as a whole," and its "words and phrases must be construed in light of other relevant statutory provisions and not in isolation." *M.M.*, 2016 IL 119932, ¶ 16. "Also, the court may consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another." *M.M.*, 2016 IL 119932, ¶ 16 (citing *Williams v. Staples*, 208 Ill. 2d 480, 487 (2004)).

Section 114-5(a) allows "the defendant" to "move the court in writing for a substitution of judge on the ground that such judge is so prejudiced against him that he cannot receive a fair trial." 725 ILCS 5/114-5(a). The motion may name only one judge as prejudiced (unless the offense is a Class X felony or may be punished by death or life imprisonment, in which case it may name two judges), and must be filed within 10 days of being put on the trial call of that judge. 725 ILCS 5/114-5(a). Case law has imposed an additional requirement that the motion be filed before the judge makes a substantive ruling in the case. *People v. McDuffee*, 187 Ill. 2d 481, 488 (1999) (citing *People v. Norcutt*, 44 Ill. 2d 256, 262-63 (1970)). Thus, the elements of a proper Section 144-5(a) motion are: (1) the motion is timely filed; (2) the motion names only one judge unless the defendant is charged with a Class X felony; (3) the motion is made in writing; (4) the motion alleges that the trial judge is prejudiced against the defendant such that the defendant cannot receive a fair trial; and (5) the motion is made before any substantive rulings in the case. *People v. Evans*, 209 Ill. 2d 194, 215 (2004).

The State has never argued that Brusaw's *pro se* motion did not meet these requirements, nor could it (see C30-31). Instead, the controversy in this case involves the nature of the right granted by Section 114-5(a) and the procedure to be followed after a Section 114-5(a) motion has been filed. To resolve that controversy, this

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Honorable Court should "begin by considering the nature and purpose of the [statute] as a general guide to the intent of the legislature in adopting particular language or provisions." *Lakewood Nursing and Rehabilitation Center, LLC v. Department of Public Health*, 2019 IL 124019, ¶ 19 (citing *M.M.*, 2016 IL 119932, ¶ 16).

For nearly a century-and-a-half, "Illinois law has protected the constitutional right to a fair and impartial trial in criminal cases by providing for the substitution of a judge who is allegedly prejudiced against a defendant" through its "automatic-substitution-of-judge statute." *People v. Walker*, 119 Ill. 2d 465, 470 (1988). The purpose of the statute is prophylactic, and the right it confers is "the 'absolute right' to have an assigned trial judge substituted upon a timely written motion containing a good-faith allegation that the judge is prejudiced." *Walker*, 119 Ill. 2d at 470. Furthermore, the right is substantive, not procedural, and it is more than just protective: Section 114-5(a) "effectuates" and "enforce[s]" the fundamental right to a fair trial. *Walker*, 119 Ill. 2d at 479-80.

> The vigor with which this court has upheld the basic constitutional right to a trial before a fair and impartial judge is reflected in this court's long held view that the provisions of the automatic-substitution-of-judge statute should be construed liberally "to promote rather than defeat" substitution, and its willingness to find reversible error where the statute is not so construed.

Walker, 119 Ill. 2d at 470-71.

Section 114-5(a) Confers a Personal Right

In light of both the prophylactic and effectuating natures of Section 114-5(a), as well as its liberal construction and the "vigor" with which it has traditionally been applied, the right conferred by Section 114-5(a) is personal to the defendant. At least three arguments support this conclusion: the existence of exceptions to

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the bar on hybrid representation, the personal nature of the right, and the historical treatment of the right by Illinois courts.

While Illinois generally enforces a bar on hybrid representation, that is, on filing motions while represented by counsel, that rule is not absolute. It does not apply, for example, to *pro se* motions alleging ineffective assistance of counsel. *People v. Serio*, 357 Ill. App. 3d 806, 815 (2d Dist. 2005). This is because " 'it contravenes human nature to expect counsel to adequately argue his own ineffectiveness' in a post[-]trial motion." *Serio*, 357 Ill. App. 3d at 815 (quoting *People v. White*, 322 Ill. App. 3d 982, 987 (4th Dist. 2001)). It similarly contravenes human nature to expect defense counsel to "rock the boat" of their employment, potentially angering judges, prosecutors, and colleagues, particularly in large public defender offices in which case assignments are often courtroom-based, by filing Section 114-5(a) motions in the courtroom to which they are assigned and in which they appear daily. The cases show that this concern is not remote. For example, defense counsel in *People v. Gold-Smith*, 2019 IL App (3d) 160665, refused to file a Section 114-5(a) motion, prompting the defendant to request to proceed *pro se* so that he could file the motion himself. *Gold-Smith*, 2019 IL App (3d) 160665, ¶ 5. The reason for defense counsel's refusal appears to have been less strategic and more about animosity towards substitution motions, as the judge in that case denied the request in large part because he viewed Section 114-5(a) as part of "a ploy" the entire in-custody criminal docket might attempt to use "to avoid being tried by him." *Gold-Smith,* 2019 IL App (3d) 160665, ¶ 5. (Note that this case originates from the same county.) Section 114-5(a) "represents the considered public policy that a defendant should be able to avoid having his liberty, and perhaps even his life, hang in balance before a judge whose impartiality he in good faith

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questions." *People v. Walker*, 119 Ill. 2d 465, 480 (1988). In light of that policy, the nature of the rights involved, and the legitimate concern that those rights might be thwarted by interests that conflict with those of the defendant, this Honorable Court should treat *pro se* Section 114-5(a) motions like *pro se* motions alleging ineffective assistance of counsel.

Such treatment would be consistent with the treatment of other decisions that are personal to the defendant. As the Appellate Court in this case recognized, "since this motion carries with it an implied accusation of judicial bias, it logically belongs to defendant." *People v. Brusaw*, 2022 IL App (3d) 190154-U, ¶ 17. That is, the Appellate Court in this case compared the decision to substitute judges with other decisions that belong to the defendant, like the decision whether to testify or be represented by counsel. *Brusaw*, 2022 IL App (3d) 190154-U, ¶ 17. These comparisons were apt. In *People v. Brocksmith*, 162 Ill. 2d 224 (1994), this Honorable Court discussed the trial decisions that had, up to then, belonged exclusively to the defendant: whether to appeal, what plea to enter, whether to have a jury trial, and whether to testify. *Brocksmith*, 162 Ill. 2d at 227 (citing *People v. Ramey*, 152 Ill. 2d 41, 54 (1992)). This list was the result of a wholesale adoption of the 1986 version of the ABA Standards for Criminal Justice, Standard 4-5.2, and the 1984 edition of Professor LaFave's treatise on criminal procedure, which identified these decisions as "fundamental." See *Ramey*, 152 Ill. 2d at 54 (citing ABA Standards for Criminal Justice 4-5.2 (Supp. 1986), *Jones v. Barnes*, 463 U.S. 745, 751 (1983), and *People v. Campbell*, 129 Ill. App. 3d 819, 821 (4th Dist. 1984)); see also *Campbell*, 129 Ill. App. 3d at 821 (citing 2 LaFave & Israel, Crim. Proc. § 11.6 at 53 (1984)). To this list, *Brocksmith* added the decision whether to tender an instruction on lesser-included offenses. *Brocksmith*, 162 Ill. 2d at

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227-29. This Court's reasoning was that tendering an instruction on a lesser-included offense is analogous to pleading guilty. Because "[i]n both instances the decisions directly relate to the potential loss of liberty on an initially uncharged offense," and "[b]ecause it is defendant's decision whether to initially plead guilty to a lesser charge, it should also be defendant's decision to submit an instruction on a lesser charge at the conclusion of the evidence." *Brocksmith*, 162 Ill. 2d at 229.

A similar analysis applies here. Initially, both of the mid-1980's sources for the list of decisions personal to the defendant are substantively outdated. The current ABA Standard recognizes that "[d]etermining whether a decision is ultimately to be made by the client or by counsel is highly contextual," lists eight specific decisions that belong personally to the defendant, and includes a ninth "catch-all" provision:

> (i) whether to proceed without counsel;
>
> (ii) what pleas to enter;
>
> (iii) whether to accept a plea offer;
>
> (iv) whether to cooperate with or provide substantial assistance to the government;
>
> (v) whether to waive jury trial;
>
> (vi) whether to testify in his or her own behalf;
>
> (vii) whether to speak at sentencing;
>
> (viii) whether to appeal; and
>
> (ix) any other decision that has been determined in the jurisdiction to belong to the client.

ABA Standards for Criminal Justice 4-5.2(a)-(b) (4th ed. 2017).

The current version of Professor LaFave's treatise, meanwhile, has all-but abandoned the fundamental-versus-strategic-decision distinction, recognizing

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that it does "not withstand critical analysis." 3 LaFave & Israel, Crim. Proc. § 11.6(c) (4th ed. Supp. 2022). Instead, it identifies a trend of balancing interests through certain factors, including: the fundamental nature of the right involved; the significance of strategic considerations; the objective of avoiding disruption of the litigation process; the distinction between "objectives" and "means"; the "inherently personal character" of the particular decision; and the need to foster a strong defense bar. 3 LaFave & Israel, Crim. Proc. § 11.6(c). It lists a number of decisions that have been called personal to the defendant by various courts: pleading guilty or taking action tantamount to entering a guilty plea; adopting, in a capital case, a jury argument which acknowledges guilt while arguing mitigation; waiving the right to a jury trial; waiving the right to be present at trial; testifying on the defendant's own behalf; foregoing an appeal; waiving the right to attend important pretrial proceedings; waiving the constitutional right to a speedy trial; refusing to enter an insanity plea; entering a stipulation as to all of the facts that allow application of a sentence enhancement; the decision to withhold a defense at the guilt phase of a capital case and use it solely in the penalty phrase; and waiving the right to be charged by a grand jury indictment. 3 LaFave & Israel, Crim. Proc. § 11.6(a) (4th ed. Supp. 2022).

The decision whether to "avoid having his liberty, and perhaps even his life, hang in balance before a judge whose impartiality he in good faith questions" is analogous to the decisions identified by the ABA and Professor LaFave as being personal to the defendant. The rights involved are absolute, substantive, and fundamental. Because the premise of a Section 114-5(a) motion is a good-faith belief that the judge named in the motion is prejudiced against the defendant

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personally, the decision to file the motion is related to the defendant's objective of obtaining a fair, unbiased trier of fact, more than it is about the means of obtaining that objective, and is of an inherently personal character. The decision is similar to waiving a jury or pleading guilty, in that it expresses the defendant's preference for or against a particular trier of fact. Like those decisions, it occurs outside of the courtroom with the benefit of time for consultation and reflection. In that way, it is unlike the conduct of *voir dire*, in which the needs of the litigation process, including the need to make split-second strategic and tactical decisions about potential jurors without disrupting the proceedings, means that counsel's expertise takes precedent. As the right conferred by Section 114-5(a) is more similar to other personal decisions belonging to the defendant than it is to strategic decisions belonging to counsel, this Honorable Court should treat the right conferred by Section 114-5(a) as a personal right.

Indeed, Illinois courts have for decades interpreted the absolute right to the automatic substitution of judges in a way that was consistent with a personal right belonging to the defendant. Older cases rejected the notion that the 10-day time period for filing a Section 114-5(a) motion, which runs from when the defendant can be " 'charged with knowledge' that the judge at issue had been assigned to the case" [*People v. McDuffee*, 187 Ill. 2d 481, 490 (1999)], begins based on defense counsel's knowledge of the case's docketing. Instead, those cases focus on the defendant's personal knowledge. For example, in *People v. Thomas*, 58 Ill. App. 3d 460 (1st Dist. 1978), the defendant filed a motion to substitute judges under a different, but similar, provision requiring that in cases with multiple defendants, the first of any series of motions to substitute filed by the co-defendants be filed within the 10-day period. *Thomas*, 58 Ill. App. 3d at 462. Although his co-defendant

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apparently did not file a motion, and although he filed his motion outside the 10-day period, the First District referred to the defendant's own lack of knowledge of the charges to reject the State's argument that he could have ascertained the name of the trial judge sooner: "There is no evidence in the record to indicate that defendant knew or should have known that the Grand Jury had indicted him on December 26, 1974, much less that the court had assigned the case for trial. On December 26, 1974, he was in Detroit, Michigan." *Thomas*, 58 Ill. App. 3d at 462-63. "Under these circumstances, it would be unrealistic to require defendant to seek a substitution of judges prior to even being arrested. To hold otherwise would be to grant him a hollow right indeed." *Thomas*, 58 Ill. App. 3d at 463.

In *People v. Samples*, 107 Ill. App. 3d 523 (5th Dist. 1982), the judge named in a motion to substitute denied the motion on the basis of untimeliness when the defendant's attorney was aware that he (the judge) was the only judge who handled criminal cases in that county. *Samples*, 107 Ill. App. 3d at 525-26. The Fifth District reversed because the cause had not actually been placed on the trial call, reasoning that counting based on counsel's knowledge of the local rules would raise questions about "precisely when the critical ten-day period might reasonably be expected to begin to run." *Samples*, 107 Ill. App. 3d at 527. Citing *Thomas*, the *Samples* Court concluded that, "Under such a system a defendant might find his right to an automatic substitution of judge for prejudice disappointingly hollow." *Samples*, 107 Ill. App. 3d at 527.[1]

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[1]As the Fifth District would later point out in *People v. Williams*, 217 Ill. App. 3d 791 (5th Dist. 1991), discussed below, *Samples* is no longer good law to the extent it allows for the filing of a Section 114-5(a) motion before the case has been put on a trial calendar. See *Williams*, 217 Ill. App. 3d at 796, 797 (quoting *Walker*, 119 Ill. 2d at 477). Brusaw cites *Samples* as an example of reasoning

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In *People v. Gunning*, 108 Ill. App. 3d 429 (4th Dist. 1982), the cause was set on September 28, 1981, for a "docket call" on October 28, 1981, at which it was placed on the trial calendar of "courtroom 'G.' " *Gunning*, 108 Ill. App. 3d at 430-31. A motion to substitute judges filed the next day was denied as untimely because the cause was a traffic case, the judge named in the motion was the only judge who heard traffic cases, and that same judge had set and presided over the docket call. *Gunning*, 108 Ill. App. 3d at 430-31. The *Gunning* Court, relying on *Samples*, held, "As applied to the instant case, it is of no consequence that [the traffic judge] was the judge assigned to traffic matters. Defendant did not know, and could not know, until October 28 that in fact [the traffic judge] was assigned to his specific case." *Gunning*, 108 Ill. App. 3d at 431-32 (citing *Samples*, 107 Ill. App. 3d at 527).

The Fifth District again focused on the defendant's own lack of knowledge in *People v. Williams*, 217 Ill. App. 3d 791 (5th Dist. 1991). Although the *Williams* Court ultimately affirmed on the basis that the motion to substitute judges was filed too soon, before the case was on a trial calendar at all, it found that the defendant could not be charged with knowing who his judge would be in part because he "appeared before six different judges during the proceedings and was without counsel" for approximately a month during that time. *Williams*, 217 Ill. App. 3d at 795, 796-97.

In *People v. Harston*, 23 Ill. App. 3d 279 (2d Dist. 1974), the Second District focused on the defendant's personal, constructive knowledge. The defendant in that case was arraigned without counsel, at which point the case was set "for

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that focuses on the defendant's personal knowledge, not as authority for filing a motion before a trial judge has been assigned.

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disposition." *Harston*, 23 Ill. App. 3d at 281. The Second District held that his Section 114-5(a) motion, filed by counsel more than a month later, was late based on an administrative order that assigned all criminal cases to a single judge, as well as on the fact that there was no other local trial call procedure. *Harston*, 23 Ill. App. 3d at 282. "Knowledge of this fact *is attributable to the defendant* and his counsel." *Harston*, 23 Ill. App. 3d at 282 (emphasis added).

While these cases are primarily about the timing rules for Section 114-5(a) motions, some of which have changed over the years [see *supra* at footnote 1], they are significant here because they teach that the relevant knowledge is that of the defendant. The defendant in *Thomas* could not be charged with knowledge of the judicial assignment because he was in Detroit, while the defendant in *Williams* could not be charged with such knowledge in part because his case bounced between courtrooms. Defense counsel in *Samples* knew what judge would eventually be assigned to the case, well before the motion in that case was filed. The same was true in *Gunning*. Even cases that appear to impute defense counsel's knowledge onto the defendant tend to do so on the basis of record evidence that defense counsel used the assigned judge's name in open court, suggesting that the defendants in those cases also had actual knowledge. See *People v. Tate*, 2016 IL App (1st) 140598, ¶ 16 (the Appellate Court could not infer that defense counsel knew the case had been assigned to a specific judge when he used the courtroom number, but not the judge's name, in open court; citing, in comparison, *People v. Saunders*, 135 Ill. App. 3d 594, 600 (2d Dist. 1985), in which the Appellate Court imputed defense counsel's knowledge onto the defendant when defense counsel used the judge's name in court). And even the exceptions to *that* trend make inferences about the defendant's personal knowledge, as opposed to merely imputing defense

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counsel's knowledge. For example, in *People v. Aldridge*, 101 Ill. App. 3d 181 (1st Dist. 1981), the First District charged the defendant with knowledge of local courtroom assignment procedures when his attorney represented him in at least eight hearings over six months. *Aldridge*, 101 Ill. App. 3d at 184-85. If it was defense counsel's knowledge that mattered, the number of hearings would be irrelevant. Consequently, it was the defendant's constructive knowledge that counted, not defense counsel's actual knowledge.

The First District similarly focused on the defendant's knowledge and perspective when it explicitly found that Section 114-5(a) confers a personal right in *People v. Lackland*, 248 Ill. App. 3d 426 (1st Dist. 1993). The defendant was initially found unfit for trial, and the pre-trial phase included extensive fitness proceedings. *Lackland*, 248 Ill. App. 3d at 428-29. He filed his Section 114-5(a) motion shortly after being restored to fitness, which was denied as being untimely because the case had been assigned to the judge's courtroom months earlier. *Lackland*, 248 Ill. App. 3d at 429. The First District, citing *Gunning*, found that the defendant could not have known that the case had been put on the trial calendar until after the fitness proceedings concluded. This was both because fitness was the only issue in front of the judge prior to that point, and because "prior to [the restoration hearing], defendant was not fit to exercise his right under the automatic substitution statute." *Lackland*, 248 Ill. App. 3d at 432-33. "It is *defendant's* right and responsibility to direct such a motion, not defense counsel's right." *Lackland*, 248 Ill. App. 3d at 433 (emphasis in original).

Although it did not cite *Lackland*, the Third District agreed with its conclusion that the right conferred by Section 114-5(a) is a personal right in *Gold-Smith*, 2019 IL App (3d) 160665. In addition to believing that Section 114-5(a) was a "ploy,"

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the judge in that case believed that the right to file a Section 114-5(a) motion belonged to defense counsel. *Gold-Smith*, 2019 IL App (3d) 160665, ¶ 5. The key to the Third District's decision reversing the judgment was the Court's finding that the right to file a motion to substitute judge is a personal right held by the defendant, and that both counsel and the judge had interfered with that right. *Gold-Smith*, 2019 IL App (3d) 160665, ¶¶ 29-31. It based this finding on the plain language of Section 114-5(a): "The statute's plain language gives 'defendant' an absolute right to one substitution of judge based on nothing more than an uncontestable allegation of prejudice. The right belongs to the defendant, not to defense counsel . . . ." *Gold-Smith*, 2019 IL App (3d) 160665, ¶ 29.

Thus, Section 114-5(a) provides a personal right to the defendant. This is shown by the plain language of the Section in light of the purpose of the Section, the nature of the right conferred by the Section, its similarities to exceptions to the bar on hybrid representation and to other personal decisions belonging to the defendant, and the long, consistent history of interpreting the Section from the viewpoint of the defendant.

A Section 114-5(a) Motion is Self-Executing

The plain language of Section 114-5(a) establishes that a motion filed pursuant to that Section is self-executing. A legal instrument or mechanism is self-executing when the rights it confers attach automatically as a matter of law, the trial court is without authority or discretion to limit its effect, or it is effective immediately without any type of implementing action. See *Scatchell v. Board of Fire and Police Commissioners for Village of Melrose Park*, 2022 IL App (1st) 201361, ¶ 80 ("But [use immunity pursuant to *Garrity v. New Jersey*, 385 U.S. 493 (1967)] is self-executing, attaching as a matter of law when a police officer is ordered by

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his public employer to answer questions about his conduct that could incriminate him."); see also *4220 Kildare, LLC v. Regent Insurance Company*, 2022 IL App (1st) 210803, ¶ 21 (referring to post-judgment interest, " 'The language of the statute is positive and self-executing,' meaning '[t]he trial court is without authority or discretion to limit the interest which thereby accrues upon a judgment.' ") (alteration in original) (quoting *In re Estate of Marks*, 51 Ill. App. 3d 535, 539 (1st Dist. 1977)); Black's Law Dictionary (11th ed. 2019), self-executing ("effective immediately without the need of any type of implementing action").

Self-executing does not imply a complete lack of intervention. "Legal instruments may be self-executing according to various standards. For example, treaties are self-executing . . . if textually capable of judicial enforcement and intended to be enforced in that manner," a standard that obviously must be assessed by a court. Black's Law Dictionary (11th ed. 2019), self-executing. *Garrity* attaches as a matter of law, but still must be asserted and enforced. See *Scatchell*, 2022 IL App (1st) 201361, ¶ 81 ("We could imagine a scenario where an individual might not know that his testimony would be immunized [under *Garrity*] and thus would assert the fifth amendment without realizing his or her full panoply of rights, leading to his or her termination."). Post-judgment interest attaches as a matter of law, but does not magically appear in the plaintiff's bank account. It is still subject to such pragmatic necessities as being initially calculated, physically written into the judgment, and occasionally subjected to accounting. See 735 ILCS 5/2-1303(a) (2023) ("When judgment is entered upon any award, report or verdict, interest shall be computed at the above rate, from the time when made or rendered to the time of entering judgment upon the same, and included in the judgment. Interest shall be computed and charged only on the unsatisfied portion of the

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judgment as it exists from time to time."); see also *4220 Kildare, LLC*, 2022 IL App (1st) 210803, ¶¶ 19-27 (determining the date from when post-judgment interest accrued, calculated at 9% per annum of the amount of the judgment). Yet it is self-executing because the right to it attaches immediately by law, and the circuit court has no discretion to deny or reduce it. *4220 Kildare, LLC*, 2022 IL App (1st) 210803, ¶ 21.

A Section 114-5(a) motion is self-executing in the same way. "[W]here a statute is clear and unambiguous, courts cannot read into the statute limitations, exceptions, or other conditions not expressed by the legislature." *People v. Glisson*, 202 Ill. 2d 499, 505 (2002). The elements of a properly filed motion for automatic substitution of judges set out in Section 114-5(a) and the case law [see *People v. Evans*, 209 Ill. 2d 194, 215 (2004)] function as limitations or conditions. See *People v. Walker*, 119 Ill. 2d 465, 483-84 (1988) (Miller, J., concurring) (describing the elements as "significant restrictions"). But they are the only conditions imposed by Section 114-5(a). Immediately after listing the elements, the Section reads, "Upon the filing of such a motion the court shall proceed no further in the cause but shall transfer it to another judge not named in the motion." 725 ILCS 5/114-5(a).

Consequently, the phrase "of such a motion" imposes both a standard and a duty to assess that standard. If the motion is not "such a motion," in that it does not meet the conditions in Section 114-5(a), the defendant has not effectively exercised the automatic right to substitute judges and the motion may be properly denied. See *People v. Evans*, 209 Ill. 2d 194, 216 (2004) ("Here, a review of the record shows that defendant's motion for substitution was untimely and, therefore, properly denied."). If the motion is "such a motion," then "the court shall proceed no further in the cause but shall transfer it to another judge not named in the

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motion." 725 ILCS 5/114-5. As in the treaty, immunity, and interest examples above, Section 114-5(a) requires intervention, but not implementation: the implement is the motion itself. That is, Section 114-5(a) requires the judge to determine that the motion meets the conditions of the Section and to do whatever physical act is practically necessary in that county to effect the transfer, but the absolute right to that transfer is not subject to the judge's discretion. That right attaches, not by virtue of the motion being allowed, but as a matter of law "[u]pon the filing of such a motion[.]"

Furthermore, it has long been recognized that the language of Section 114-5(a) does not provide for a hearing on the motion. See *Walker*, 119 Ill. 2d at 483 (Miller, J., concurring) (interpreting this language: "Thus, there is no hearing on the motion, and its allowance is automatic."); *People v. Gold-Smith*, 2019 IL App (3d) 160665, ¶ 29 ("the statute makes no provision for a hearing"). Since there is no hearing, the motion is never put on the circuit court's calendar, and the defense has neither the need nor the opportunity to argue the motion in open court. The judge determines whether the motion meets the conditions in Section 114-5(a) on his or her own. And since the judge can "proceed no further" if the motion is "such a motion," that determination necessarily must be made before taking any further action in the case.

Thus, a proper Section 114-5(a) motion is self-executing. The automatic, substantive right to substitute judges attaches as a matter of law immediately upon the filing of a motion that meets the conditions set by the Section. The judge named in such a motion has no discretion to deny the motion or to take any other actions beyond those necessary as a practical matter to transfer the case to another judge. That judge can deny a *purported* Section 114-5(a) motion that does not meet

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those conditions (and therefore is not "such a motion" in the first place), but has no third option to hold a hearing or take any other action.

A Violation of Section 114-5(a) is Automatically Reversible

A failure to follow Section 114-5(a) is reversible error and not subject to procedural default. Again, a proper Section 114-5(a) motion is self-executing, in the sense that it must be automatically granted without a hearing. See 725 ILCS 5/114-5(a) ("Upon the filing of such a motion the court shall proceed no further in the cause but shall transfer it to another judge not named in the motion."); see also *People v. Walker*, 119 Ill. 2d 465, 483 (1988) (Miller, J., concurring). Consequently, a defendant's claim of a good-faith belief that the judge named in a Section 114-5(a) motion is prejudiced is generally unassailable. *People ex rel. Baricevic v. Wharton*, 136 Ill. 2d 423, 430-31 (1990). This means that Section 114-5(a) does not require an actual showing of prejudice in order to demonstrate error, either in the trial court or on review. See *People v. Tate*, 2016 IL App (1st) 140598, ¶ 19 ("Historically, courts in Illinois have held that, upon a timely filing of a proper written motion, a defendant has an absolute right to a substitution of judge and reversible error results if erroneously denied," collecting cases); see also *id.* at ¶ 39, *supplemental opinion upon denial of rehearing* ("The trial court's erroneous denial of [the automatic and absolute right to substitute judges under Section 114-5(a)] should not result in a greater burden on defendant who timely presented his motion and was, in every regard, compliant with statute and controlling case law.").

Once a proper Section 114-5(a) motion has been filed, any action taken by a judge named in the motion, beyond transferring the case, is a nullity. For decades, Illinois courts, including this Honorable Court, have described such actions as

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"void." *People v. McDuffee*, 187 Ill. 2d 481, 492 (1999); see also *Tate*, 2016 IL App (1st) 140598, ¶ 20 (collecting cases). In *Tate*, the State challenged that characterization, citing *People v. Castleberry*, 2015 IL 116916, as having "repudiated" the "inherent authority doctrine." See *Tate*, 2016 IL App (1st) 140598, ¶¶ 24, 33. *Castleberry* eliminated the "void sentence rule" (also called the "void sentencing rule"), by which unauthorized sentences could be challenged at any time on the basis that the court lacked "inherent power" to enter such a sentence. *Castleberry*, 2015 IL 116916, ¶¶ 11-19; *Tate*, 2016 IL App (1st) 140598, ¶ 18. In the process, it characterized voidness as a matter of jurisdiction. *Castleberry*, 2015 IL 116916, ¶ 11; *Tate*, 2016 IL App (1st) 140598, ¶ 18.

The *Tate* Court rejected the State's argument. It noted first that this Honorable Court recognized another basis for voidness in judgments entered on facially unconstitutional statutes almost immediately after *Castleberry*. *Tate*, 2016 IL App (1st) 140598, ¶ 26 (citing *People v. Thompson*, 2015 IL 118151, ¶ 15). Voidness, therefore, is not *just* a matter of jurisdiction. The *Tate* Court also noted this Court's admonishment that the term "void" must be analyzed in context in order to determine its meaning. *Tate*, 2016 IL App (1st) 140598, ¶ 31 (citing *People v. Davis*, 156 Ill. 2d 149, 155 (1993)). In *Castleberry*, the "inherent power" this Court referred to was explicitly "the 'inherent power' notion of jurisdiction[.]" *Castleberry*, 2015 IL 116916, ¶ 18. But because jurisdiction lies with the court itself and not the judge [*Tate*, 2016 IL App (1st) 140598, ¶ 31], "void" in this context was never about jurisdiction. Instead, "a motion for substitution of judge relates to a perceived bias by a judge, not to the court's jurisdiction," and therefore, "the *McDuffee* [C]ourt's use of the term 'void' is not intended to refer to the court's jurisdiction but instead to actions taken by the trial judge." *Tate*, 2016 IL App

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(1st) 140598, ¶ 31. Furthermore, the *Tate* Court observed that " 'inherent power' is not synonymous with jurisdiction." *Tate*, 2016 IL App (1st) 140598, ¶ 35 (citing *Miller v. General Tel. Co. of Illinois*, 29 Ill. App. 3d 848, 853 (2d Dist. 1975), and *People v. Heil*, 49 Ill. App. 3d 55, 59 (5th Dist. 1977), *rev'd* 71 Ill. 2d 458 (1978)). Consequently, "the 'void sentencing rule' addressed in *Castleberry* differs from the void orders resulting from" violations of Section 114-5(a), and "the inherent authority doctrine is alive and well in our jurisprudence," even after *Castleberry*. *Tate*, 2016 IL App (1st) 140598, ¶ 36.

Both *Castleberry* and the plain language of Section 114-5(a) make these last points clear. The holding in *Castleberry* was based on an extension of civil jurisdiction rules to criminal cases, where the civil equivalent of the inherent power notion of jurisdiction was eliminated in 2001 at the latest. *Castleberry*, 2015 IL 116916, ¶¶ 14-19 (quoting *LVNV Funding, LLC v. Trice*, 2015 IL 116129, ¶¶ 30-38, itself discussing *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514 (2001), and *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 353 (2002)). Yet this Honorable Court has continued to refer to judicial actions taken in civil cases after violations of the right to substitute judges as either "void" or "a nullity." See, *e.g.*, *Palos Community Hospital v. Humana Insurance Company, Inc.*, 2021 IL 126008, ¶ 34; see also, *e.g.*, *In re Estate of Wilson*, 238 Ill. 2d 519, 568 (2010). As *Castleberry* adopts the reasoning of the civil cases, and as civil judgments entered after a proper motion to substitute by a judge named in that motion are void, the same must be true of similar judgments entered in criminal cases. See *Kelley v. Sheriff's Merit Comm'n*, 372 Ill. App. 3d 931, 934 (2d Dist. 2007) ("But to determine a judicial decision's precedential effect in a subsequent case, a court must consider the *ratio decidendi* of the earlier decision.").

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In terms of the plain language of Section 114-5(a), the inherent power of the court on which the void sentence rule was based is simply different than the power an individual judge loses upon the filing of a Section 114-5(a) motion. See *Tate*, 2016 IL App (1st) 140598, ¶ 37 ("*McDuffee*, like the case at bar, does not fit within the narrow confines of *Castleberry's* jurisdictional analysis. Noticeably, neither *McDuffee*, nor any of the cases which preceded it, discuss the erroneous denial of a [S]ection 114-5(a) motion in the context of jurisdiction."). Rather, "[u]pon the filing of such a motion the court *shall proceed no further* in the cause but *shall transfer it to another judge* not named in the motion." 725 ILCS 5/114-5(a) (emphasis added). The transfer is the only action the judge named in the motion has the power to take. As to any other action, the judge has as much authority as someone who is not a judge at all. Such actions are unenforceable.

The *Tate* Court identified two other reasons this issue is not subject to procedural default. The simplest was that, "given that the right to a [S]ection 114-5(a) substitution of judge is absolute and automatic reversal is required for its denial, to honor a defendant's procedural default would elevate form over substance," especially given that a judge named in the Section 114-5(a) motion would not even have power to grant a post-trial motion. *Tate*, 2016 IL App (1st) 140598, ¶ 44. More significantly, however, this Honorable Court constitutionalized this issue in *Walker*. *Tate*, 2016 IL App (1st) 140598, ¶ 42 (citing *Walker*, 119 Ill. 2d at 480-81). A concurrence in *Walker* understood its holding the same way. *Walker*, 119 Ill. 2d at 484-85 (Miller, J., concurring). The *Tate* Court concluded that, because constitutional issues that are raised at trial and may be raised later in a post-conviction petition are not subject to waiver, a violation of Section 114-5(a) is not

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required to be raised in a post-trial motion. *Tate*, 2016 IL App (1st) 140598, ¶¶ 44-45 (citing *People v. Cregan*, 2014 IL 113600, ¶¶ 16-18, and *People v. Enoch*, 122 Ill. 2d 176, 190 (1988)).

Finally, this issue is susceptible to second-prong plain-error review. The plain-error doctrine allows a court to review otherwise defaulted issues when the evidence is closely balanced, or when the error is so egregious that it undermined the fairness of the trial and the integrity of the judicial system. *People v. Wilson*, 2022 IL App (5th) 190377, ¶ 37. In *People v. Glasper*, 234 Ill. 2d 173 (2009), this Honorable Court held that the failure to ask the questions set out in Illinois Supreme Court Rule 431(b) during *voir dire* was not a second-prong or "structural" error because those questions were not constitutionally required, were not indispensable to a fair trial, and were not entirely mandatory. *Glasper*, 234 Ill. 2d at 196-200. That is, the right to such questioning was not absolute. By contrast, the right conferred by Section 114-5(a) is absolute, substantive, and constitutionally required. It is not merely a way in which Illinois attempts to protect the right to a fair trial, such as is the case with Rule 431(b), but rather, is the way Illinois enforces and effectuates that right. *Walker*, 119 Ill. 2d at 470, 479-80. Trial in front of a judge who has not only been named in a motion to substitute by right, but who, along with defense counsel, has thwarted the absolute, substantive right to substitution, manifestly undermines the integrity of the judicial system.

This Case

The Appellate Court's judgment reversing Brusaw's convictions in this case was correct. Brusaw filed a proper Section 114-5(a) motion, one that met all of the conditions set by Section 114-5(a), on October 5, 2017, six days after the case was assigned to the judge named in the motion (C30-31, 196-97; R16). Because

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the right conferred by Section 114-5(a) was personal to Brusaw, it did not matter that he was represented by counsel at that point. Rather, the motion was self-executing: the judge lost all power to act beyond transferring the case. Because the judge lost all other power over the case, the judgment in the case is null and void. For the same reason, and additionally because of the constitutional and structural natures of Section 114-5(a), the failure to include the issue in a post-trial motion did not waive or forfeit review. Instead, the issue was properly before the Appellate Court, which appropriately reversed and remanded the judgment.

The State's Arguments

The State first argues that Brusaw acquiesced to trial in front of the judge named in his Section 114-5(a) motion (St. Br. 8-9). The cases it cites state the general principles of acquiescence, but none of them address Section 114-5(a) (St. Br. 8-9 (citing *People v. Patrick*, 233 Ill. 2d 62, 77 (2009), *People v. Parker*, 223 Ill. 2d 494, 507-08 (2006), *People v. Harvey*, 211 Ill. 2d 368, 385 (2004), *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001), and *People v. Schmitt*, 131 Ill. 2d 128, 137 (1989)). Importantly, none of these cases analyze acquiescence in the context of a judge who has, as a matter of law, lost all power to act in the case. This is not, for example, like *People v. Petrie*, 2021 IL App (2d) 190213, in which the defendant was held to have acquiesced to a trial in front of a judge *not* named in the motion, despite the jury waiver having been taken by the judge who had been named in the motion. *Petrie*, 2021 IL App (2d) 190213, ¶ 29. Rather, Brusaw was tried in front of a judge who did not have legal authority to continue hearing the case. See 725 ILCS 5/114-5(a) ("Upon the filing of such a motion the court shall proceed no further in the cause but shall transfer it to another judge not named in the motion."). Furthermore, it is not accurate to say that Brusaw agreed to be tried in front of

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this particular judge. "[T]he the assignment of judges to a cause varies in Illinois." *People v. Evans*, 209 Ill. 2d 194, 215 (2004). In Will County, "[a]ll cases within [the criminal felony] division are transferable between judges assigned without written order by the Chief Judge . . . ." Amended Administrative Order No. 2021-52, Amended Assignment Order, Twelfth Judicial Cir. (*eff.* Jan. 3, 2022). Neither the written nor the oral waiver mentioned the judge by name (C48; R58-61). Brusaw was waiving his right to a jury trial, not agreeing to trial in front of a specific judge.

The State next claims that Brusaw abandoned his Section 114-5(a) motion (St. Br. 9-12). But the Appellate Court was correct that "the motion is not subject to the common abandonment principal that puts the onus on defendant to secure a ruling on his motion" because the plain language of the Section "clearly directs a court to respond to the motion" without a hearing "before it may proceed any further in the case." *People v. Brusaw*, 2022 IL App (3d) 190154-U, ¶ 14. That is, because a Section 114-5(a) motion does not call for a hearing and is to be automatically allowed, *i.e.*, is self-executing, all Brusaw was required to do to exercise his absolute right to substitute judges was file a motion that met the conditions set by the Section. He did not abandon the motion: it was effectively denied when the judge did not promptly transfer the case as she was required by law to do. Notably, this case is not like *Petrie* in this sense either, where in addition to acquiescence, the motion was deemed abandoned when the judge explicitly gave defense counsel, who appeared in the case after the motion was filed, the opportunity to "reevaluate" whether to stand on the motion. *Petrie*, 2021 IL App (2d) 190213, ¶¶ 24-26. Here, counsel was not new, acknowledged and implicitly adopted the motion, and was not given the explicit option of reevaluating the motion (see R19). Besides, *Petrie* was wrong on this point. In response to the

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defendant's argument that the motion should have been granted automatically, the Court said the defendant "cites no law suggesting that" the motion could not be reevaluated by new defense counsel. *Petrie*, 2021 IL App (2d) 190213, ¶ 26. But the law is in the plain language of Section 114-5(a): "Upon the filing of such a motion the court shall proceed no further in the cause but shall transfer it to another judge not named in the motion." 725 ILCS 5/114-5(a). The Section is unambiguously self-executing, and the motion in *Petrie*, like the motion in this case, should have been automatically allowed before any further actions were taken in the case.

The State argues that Section 114-5(a) is not self-executing (St. Br. 10-11). Its evidence is the fact that a Section 114-5(a) is subject to certain elements, which the State believes means that a Section 114-5(a) motion is not automatically granted (St. Br. 11 (citing *People v. Evans*, 209 Ill. 2d 194, 215 (2004)). This misunderstands the nature of a self-executing instrument and ignores the plain language of the Section requiring the trial court to "proceed no further." Like the payment of post-judgment interest, a transfer under Section 114-5(a) does not happen by magic, but that does not mean it is not self-executing. Again, "[l]egal instruments may be self-executing according to various standards." Black's Law Dictionary (11th ed. 2019), self-executing. In the case of Section 114-5(a), the standard is that the motion must be "such a motion" as that described by the conditions imposed by the Section. The trial court must automatically allow a motion that meets those conditions and must "proceed no further" "[u]pon the filing of such a motion." 725 ILCS 5/114-5(a); *People v. Walker*, 119 Ill. 2d 465, 483 (1988) (Miller, J., concurring). This necessarily means that, before taking any further actions in the case, the judge must either deny the motion as being not "such a motion" or effect the transfer

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to another judge, since the right to that transfer attaches immediately "[u]pon the filing of such a motion." Indeed, Section 114-5(a) does not actually refer to allowing the motion, but rather, says that the judge "shall transfer [the cause] to another judge not named in the motion" "[u]pon the filing of such a motion[.]" 725 ILCS 5/114-5(a). Thus, Section 114-5(a) is self-executing.

Next, the State argues that a Section 114-5(a) motion can be forfeited because (1) constitutional rights, even fundamental ones, can be forfeited, and (2) a Section 114-5(a) motion "does *not* directly implicate the constitutional right to an impartial trial" because "it is merely a prophylactic mechanism for protecting that right" (St. Br. 12-13 (emphasis in original)). As to the first point, the State again ignores the plain language of the Section, which deprives an individual judge named in the motion of judicial authority to act beyond transferring the case, rendering subsequent judgments entered by that judge void. 725 ILCS 5/114-5(a). It also ignores decades of precedent, including recent precedent from this Honorable Court (albeit in the analogous civil context) holding that such judgments are void. *Palos Community Hospital v. Humana Insurance Company, Inc.*, 2021 IL 126008, ¶ 34; *People v. Tate*, 2016 IL App (1st) 140598, ¶ 20 (collecting cases). As to the second point, again, Section 114-5(a) is *not* merely prophylactic. It confers an absolute, substantive right of constitutional dimensions that enforces and effectuates the right to a fair trial. *Walker*, 119 Ill. 2d at 479-80.

The State argues that Brusaw's Section 114-5(a) motion was not properly before the trial court because Brusaw was represented at the time, implying that Section 114-5(a) does not confer a personal right (St. Br. 14-18). Brusaw has adequately addressed above why the bar on hybrid representation should not apply and why Section 114-5(a) confers a right personal to the defendant, including why

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the decisions that have been held to belong to the defendant or to defense counsel in the past support Brusaw's position (see St. Br. 17-18). Among other things, the decision whether to "avoid having his liberty, and perhaps even his life, hang in balance before a judge whose impartiality he in good faith questions" is analogous to the decisions identified by the ABA and Professor LaFave as being personal to the defendant, while being materially different from decisions, such as the conduct of *voir dire*, that belong to defense counsel.

To these prior arguments, Brusaw adds an additional point. In terms of the plain language of Section 114-5(a) referring to "the defendant," the State argues that "most statutes governing criminal procedure refer to the 'defendant' rather than 'defense counsel' " (St. Br. 15-17). But this statute is different than most. Again, this one confers a right that is absolute, substantive, and of a constitutional dimension. It is not merely prophylactic, but rather is the way in which Illinois enforces and effectuates the right to a fair trial. *Walker*, 119 Ill. 2d at 479-80. And it has long been interpreted by looking at the defendant's personal knowledge and perspective. See, *e.g.*, *People v. Samples*, 107 Ill. App. 3d 523, 527 (5th Dist. 1982) ("Under such a system [based on defense counsel's constructive knowledge of judicial assignments] a defendant might find his right to an automatic substitution of judge for prejudice disappointingly hollow."). In short, no one can seriously argue that the right to a fair trial belongs to defense counsel instead of the defendant. The same is true of the right to effectuate a fair trial by exercising the absolute, substantive right to automatically substitute judges. That does not imply, as the State suggests, that defendants have the right or obligation to file other routine motions (see St. Br. 16-17). Section 114-5(a) and its predecessors have occupied a special place in our laws for nearly a century-and-a-half. *Walker*, 119 Ill. 2d

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at 470. In that roughly 150 years, the special treatment of the automatic right to substitute judges has never required defendants to be allowed to file other routine motions. Continuing that treatment, which is all the Appellate Court did in this case, will not change anything.

Finally, the State argues that Brusaw cannot establish either prong of plain error (St. Br. 18-22). Brusaw has adequately explained above why a violation of the right to automatically substitute judges is amenable to second-prong plain-error analysis. Suffice it to say here that the State's argument, which is largely based on the fact that a Section 114-5(a) motion does not require proof of bias [see St. Br. 21], is contrary to the history, purpose, and nature of the right conferred by that Section. Section 114-5(a) enforces and effectuates the right to a fair trial and "represents the considered public policy that a defendant should be able to avoid having his liberty, and perhaps even his life, hang in balance before a judge whose impartiality he in good faith questions." *Walker*, 119 Ill. 2d at 479-80. Consequently, the basis of a good-faith claim that a judge is biased is generally beyond question. *People ex rel. Baricevic v. Wharton*, 136 Ill. 2d 423, 430-31 (1990). Aside from the fact that Brusaw did not choose to have this specific judge hear his case, asking whether he actually believed the judge to be biased is not an appropriate inquiry (see St. Br. 22).

Conclusion

Brusaw filed a proper Section 114-5(a) motion, one that met all the conditions set by that Section. He had a personal right to do so. His motion was self-executing: Section 114-5(a) required the judge named in the motion to "proceed no further" and to "transfer [the case] to another judge not named in the motion." That same language, as well as current and long-standing practice, deprived the judge of

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authority to act beyond the transfer and rendered all subsequent judgments null and void. Similarly, it meant that the motion was not subject to abandonment, as Section 114-5(a) does not allow for a hearing, and thus, Brusaw did all he was required to do in order to exercise his automatic, substantive right to substitute judges. That is, the error had already occurred when the judge "proceed[ed] . . . further" and held the next hearing, in violation of the plain language of Section 114-5(a). And for a variety of reasons discussed above, Brusaw's Section 114-5(a) motion was also not subject to procedural default for not appearing in a post-trial motion. Consequently, the Appellate Court was correct to reverse the judgment of the trial court. This Honorable Court should therefore affirm the judgment of the Appellate Court.

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II. This Honorable Court should reduce Bryan Brusaw's sentence for felony driving while license revoked to the maximum non-extended term of three years.

Section 5-8-2 of the Code of Criminal Procedure authorizes extended-term sentences only when certain factors have been met, and only for the greatest class of felony in the case, unless the extended-term sentences are imposed on separately charged, differing class offenses that arose from unrelated courses of conduct. 730 ILCS 5/5-8-2(a) (2017); *People v. Reese*, 2017 IL 120011, ¶ 83; *People v. Jordan*, 103 Ill. 2d 192, 205-06 (1984). The unauthorized imposition of an extended-term sentence on a lesser class of felony "is routinely reviewed as second-prong plain error" and is correctable despite not being included in a post-sentencing motion. *People v. Ramsey*, 2018 IL App (2d) 151071, ¶ 32. Whether an extended-term sentence was an authorized disposition in this case is a matter of statutory interpretation this Honorable Court reviews *de novo*. *People v. Larry*, 2015 IL App (1st) 133664, ¶ 23.

In this case, Bryan Brusaw was charged with aggravated driving under the influence and felony driving on a revoked license. The two charges were brought simultaneously and involved a single course of conduct (see C15-17). Aggravated driving under the influence was charged as a class X felony, and a nine-year sentence was entered (C15-16, 180). 625 ILCS 5/11-501(a)(2), (d)(2)(E) (2017). Felony driving while license revoked was charged as a class 4 felony, and a six-year sentence was entered (C17, 180). 625 ILCS 5/6-303(a), (d-3) (2017). The sentencing range for a class X felony is 6-to-30 years' incarceration; the extended-term sentencing range is 30-to-60 years' incarceration. 730 ILCS 5/5-4.5-25(a) (2017). The sentencing range for a class 4 felony is one-to-three years' incarceration; the extended-term range is three-to-six years' incarceration. 730 ILCS 5/5-4.5-45(a) (2017). While

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the class X offense in this case received a non-extended-term sentence, the class 4 offense received the maximum extended-term sentence of six years' incarceration (C180).

The State has confessed error (St. Br. 22). Therefore, this Honorable Court should reduce Brusaw's class 4 sentence to the maximum non-extended term of three years' incarceration. See *Ramsey*, 2018 IL App (2d) 151071, ¶ 33 (reducing unauthorized extended term to maximum non-extended term).

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CONCLUSION

Because he was convicted after a bench trial presided over by a judge named in his timely and proper automatic substitution motion, and because he was given an unauthorized disposition, Bryan N. Brusaw, defendant-appellee, respectfully requests that this Honorable Court affirm the Appellate Court's judgment reversing Brusaw's convictions and remanding the cause, or in the alternative, reduce his class 4 sentence to the maximum non-extended term of three years' incarceration.

Respectfully submitted,

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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 34 pages.

/s/Sean Conley
SEAN CONLEY
Assistant Appellate Defender

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No. 128474

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 3-19-0154.
	)	
Plaintiff-Appellant,	)	There on appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 17 CF 1812.
-vs-	)	
	)	
BRYAN N. BRUSAW,	)	Honorable Sarah F. Jones,
Defendant-Appellee.	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@ilag.gov;

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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 April 17, 2023, 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. mailbox in Ottawa, 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.

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