No. 129585

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- ALVIN BROWN, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-22-0400. There on appeal from the Circuit Court of the Seventeenth Judicial Circuit, Boone County, Illinois, No. 17-CF-202. Honorable C. Robert Tobin III, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE

Alvin Brown pled guilty to the offense of driving while driver's license is revoked and was sentenced to nine years in prison. This is a direct appeal from the judgment of the circuit court denying his post-plea motion, which was entered pursuant to a remand order by the Second District Appellate Court.[1] No issue is raised challenging the charging instrument.

ISSUES PRESENTED FOR REVIEW

1. Whether the defendant was entitled to elect the benefit of an amended Class X recidivism provision that took effect after sentencing but before the trial court ruled on his post-plea motion.

2. Whether the record rebutted post-plea counsel's facially-sufficient Rule 604(d) certificate.

[1] The original appeal in this case (Appeal Number 2-20-0432) was heard by the Second District because at that time Boone County was in the Second District. Pursuant to the recent redistricting, Boone County is now in the Fourth District.

STATUTES AND RULES INVOLVED

730 ILCS 5/5-4.5-95 (2019)

[***]

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

(1) the first felony was committed after February 1, 1978 (the effective date of Public Act 80-1099);

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

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

730 ILCS 5/5-4.5-95 (2022)

[***]

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

(1) the first forcible felony was committed after February 1, 1978 (the effective date of Public Act 80-1099);

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

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

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

5 ILCS 70/4 (2022)

No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act.

Supreme Court Rule 604(d)

No appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment.

No appeal shall be taken upon a negotiated plea of guilty challenging the sentence as excessive unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment. For purposes of this rule, a negotiated plea of guilty is one in which the prosecution has bound itself to recommend a specific sentence, or a specific range of sentence, or where the prosecution has made concessions relating to the sentence to be imposed and not merely to the charge or charges then pending.

The motion shall be in writing and shall state the grounds therefor. [***]

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

[***] Upon appeal any issue not raised by the defendant in the motion to reconsider the sentence or withdraw the plea of guilty and vacate the judgment shall be deemed waived.

[***]

STATEMENT OF FACTS

Alvin Brown was charged by indictment with driving while driver's license revoked. The offense allegedly occurred on June 3, 2017, and was charged as a Class 2 felony because Mr. Brown had at least 14 prior violations of driving while license revoked. (C. 15)

On October 21, 2019, the case was set for a jury trial. Defense counsel, John Logan, indicated that Mr. Brown wanted to proceed *pro se*. The court said that the trial was going to begin in 30 minutes regardless of whether Mr. Brown represented himself or was represented by counsel. Mr. Brown stated that he was not ready for trial and subsequently withdrew his request to represent himself. (R. 28, 31) The case was passed for Mr. Brown to speak to his attorney. (R. 31)

When the case was recalled, defense counsel indicated that Mr. Brown wanted to enter an open guilty plea. (R. 32) The court admonished Mr. Brown that he would receive a Class X sentence on this Class 2 felony because of his prior convictions. (R. 34-35) After hearing a factual basis for the plea, the court accepted the guilty plea, and the case was continued for a sentencing hearing. (R. 39-40)

On November 7, 2019, at the sentencing hearing, defense counsel argued that Mr. Brown should not face Class X sentencing because it represented a "double enhancement." (R. 49) The court disagreed and found that Mr. Brown was eligible for mandatory Class X sentencing. (R. 49-50) The court sentenced Mr. Brown to nine years in prison. (R. 82; C. 64)

Mr. Brown filed a *pro se* motion to withdraw the guilty plea and a *pro se* motion to reconsider sentence. These motions were file-stamped on December 9, 2019. (C. 70, 75-76) A notarized proof of service showed that Mr. Brown placed

the motion to withdraw the plea in the prison mail on December 4, 2019. (C. 72) The motion to withdraw the guilty plea alleged that Mr. Brown wanted to go to trial but was coerced into pleading guilty by his attorney's statement that he would get a 20-year prison sentence if he went to trial. (C. 70) The motion to reconsider sentence contained no allegations. (C. 75-76)

Based on the allegations in these motions, the court appointed a different attorney, Russell Luchtenburg, to represent Mr. Brown. (C. 81) Defense counsel did not file an amended motion, but filed a Rule 604(d) certificate, which stated that he had consulted with his client about his "contentions of error in the sentence." (C. 106)

On July 27, 2020, a hearing was held on the post-plea motions. Defense counsel indicated that Mr. Brown was pursuing only the motion to reconsider sentence, not the motion to withdraw the guilty plea. (R. 105) In arguing the motion to reconsider sentence, defense counsel said that Mr. Brown believed he should receive a Class 2 sentence, not a Class X sentence. (R. 106) The court denied the motion. (R. 109-10) Mr. Brown filed a notice of appeal. (C. 107)

On December 4, 2020, the Second District granted Mr. Brown's unopposed motion for summary remand, vacating the denial of Mr. Brown's post-plea motion and remanding the case for: "(1) the filing of a valid Rule 604(d) certificate; (2) the opportunity to file a new motion to withdraw the guilty plea and/or reconsider the sentence, if counsel concludes that a new motion is necessary; and (3) a new motion hearing." (C. 151)

On remand, counsel filed a facially-sufficient Rule 604(d) certificate. (C. 153) Counsel also filed a "Motion to Withdraw Guilty Plea and Vacate Sentence." In its entirety, the motion stated:

> NOW COMES the defendant, Alvin Brown, by his attorney Russell J. Luchtenburg, and moves this Honorable Court to enter an Order withdrawing the plea of guilty and to vacate the sentence and in support thereof, the defendant states as follows:
>
> 1: On November 7, 2019, the defendant entered a plea of guilty and was sentenced to the Illinois Department of Corrections for a period of nine years and three years for mandatory supervised reporting.
>
> 2: The defendant is currently detained in the Shawnee Correctional Center in Vienna, Illinois.
>
> 3: The defendant did not understand the consequences or the effect the plea would have at that time.
>
> WHEREFORE, the defendant respectfully requests as follows:
>
> 1: Grant this motion and enter an order vacating the plea of guilty.
>
> 2: Set this matter for a pretrial conference, and
>
> 3: Grant any other relief that this Court deems just and proper.

(C. 159)

On May 11, 2022, defense counsel filed another Rule 604(d) certificate. (C. 170) That day, the court held a hearing on the post-plea motion. At that hearing, defense counsel stated:

> Judge, we have filed a motion to – and I believe – I just want to make sure I have – a motion to withdraw the guilty plea and a motion to vacate the sentence and have him resentenced. Judge, I've had an opportunity to talk with my client and one of the things that we were looking at – I don't believe – I believe were going to withdraw the – withdrawing the guilty plea. We're not going to pursue – I don't have an argument to make with that. What we're doing is going back to what we had brought up at the past hearing which was the – whether or not the consequences of the sentence would be reconsidered.

(R. 129)

The court asked defense counsel if he was seeking a motion to reconsider the sentence, not a motion to withdraw the guilty plea. Defense counsel answered

in the affirmative. (R. 129) As a basis for reconsidering the sentence, defense counsel argued that the Class X sentencing statute had been amended such that it "would not apply today," but was "not retroactive." Defense counsel also mentioned new legislation that allowed the State to "take a look at the sentence that was imposed." Defense counsel concluded, "Basically it's the same argument that we made several years ago but then we didn't have a 604(d) form and it got sent back." (R. 130)

The State asked if the defense was stipulating to the arguments at the prior post-plea hearing. Defense counsel confirmed that he was stipulating. (R. 130-31) The court added, "With the only difference I think the Class X rule has changed since last July." The State argued that the amendment to the Class X sentencing statute was not retroactive and Mr. Brown's sentence was within the extended-term Class 2 range. (R. 131) The court ultimately ruled that the sentence was properly imposed and accordingly denied the defense's motion. (R. 131-32) Mr. Brown subsequently appealed. (C. 171-72)

On appeal, Mr. Brown argued: (1) The case should be remanded for resentencing because he was not given the opportunity to elect the benefit of an amended Class X recidivism provision that took effect before the trial court ruled on the post-plea motion; and (2) Alternatively, the case should be remanded for further post-plea proceedings where the record refuted post-plea counsel's facially-valid Rule 604(d) certificate.

The Fourth District rejected both arguments. Regarding the first claim, the appellate court held that Mr. Brown did not have the right to elect to be sentenced under the amended statute because it was not effective on the date of sentencing. *People v. Brown*, 2023 IL App (4th) 220400, ¶¶ 35-51. On the second claim, the Fourth District relied on *People v. Shirley*, 181 Ill. 2d 359 (1998), to

find that a remand was unnecessary because Mr. Brown received a "full and fair opportunity to present his post-plea claims." 2023 IL App (4th) 220400, at ¶¶ 57-58. In reaching this conclusion, the appellate court found that post-plea counsel had preserved for appeal an excessive sentencing argument because that claim "was presented to and considered by the [trial] court." 2023 IL App (4th) 220400, at ¶ 60.

This Court granted leave to appeal.

ARGUMENT

I.

Alvin Brown was entitled to elect the benefit of a Class X recidivism provision that took effect after sentencing but before the trial court ruled on the post-plea motion.

Alvin Brown entered an open guilty plea to one count of driving while license revoked. (R. 32) Since Mr. Brown had over 14 prior convictions for this offense, the conviction was a Class 2 felony. (C. 15) At the time of his sentencing, Mr. Brown was eligible for mandatory Class X sentencing. 730 ILCS 5/5-4.5-95(b) (2019). However, by the time the trial court ultimately ruled on the post-plea motion, the statute had been amended so that non-forcible felonies, such as the offense in the instant case, did not trigger mandatory Class X sentencing. 730 ILCS 5/5-4.5-95(b) (2022).

The appellate court districts are split on whether, in this situation, Mr. Brown should have had the right to elect to be sentenced under the amended statute. The First and Second Districts have held that an amended sentencing statute applies when it was effective at a time when the case was still pending in the trial court. *People v. Spears*, 2022 IL App (2d) 210583; *People v. Gray*, 2019 IL App (1st) 161646-U.[2] Conversely, the Third and Fourth Districts have held that an amendment must be effective at the time of sentencing for a defendant to have the right to elect on it. *People v. Brown*, 2023 IL App (4th) 220400; *People v. Foster*, 2022 IL App (3d) 210342-U.[3] This Court should adopt the former approach and,

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[2] This unpublished decision is not cited for precedential value, but to present this Court with a complete view of existing caselaw.

[3] This unpublished opinion is being cited to provide this Court with a complete view of the law pursuant to Supreme Court Rule 23(e)(1), which allows for unpublished opinions to be cited for persuasive purposes.

ultimately, remand Mr. Brown's case for re-sentencing in the extended-term Class 2 sentencing range.

Whether a statute applies to a defendant is a legal question subject to *de novo* review. *People v. Cardamone*, 232 Ill. 2d 504, 511 (2009).

In Illinois, when a new law contains no explicit indication of temporal reach, Section 4 of the Statute on Statutes guides its application. *Caveney v. Bower*, 207 Ill. 2d 82, 91-94 (2003). This statute states:

> No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act.
>
> 5 ILCS 70/4 (2022)

Under this statute, it is undisputed that a defendant has the right to elect whether to be sentenced under the law in effect at the time of the offense or the law in effect at the time of sentencing. *People v. Hollins*, 51 Ill. 2d 68, 71 (1972). When a defendant has the right to make such an election, the record must reflect that he was advised of his right to elect and expressly waived the right. *Hollins*, 51 Ill. 2d at 71; *People v. Gancarz*, 228 Ill. 2d 312, 318 (2008). The absence of this admonishment violates the defendant's due process rights. *Hollins*, 51 Ill. 2d at 71; *People v. Delgado*, 2022 IL App (2d) 210008, ¶ 27.

There is an open question regarding whether a defendant has a similar right to elect when an amendment is not effective at the time of sentencing, but is effective while the case is still pending in the trial court. This situation presents itself here where an amended Class X sentencing provision became effective before the denial of Mr. Brown's post-plea motion.

Prior to July 1, 2021, the Class X sentencing provision of the General Recidivism statute stated in pertinent part:

> (b) When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony . . . after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now . . . classified in Illinois as a Class 2 or greater Class felony . . . that defendant shall be sentenced as a Class X offender. This subsection does not apply unless:
>
> > (1) the first felony was committed after February 1, 1978 (the effective date of Public Act 80-1099);
> >
> > (2) the second felony was committed after conviction on the first; and
> >
> > (3) the third felony was committed after conviction on the second.

However, 730 ILCS 5/5-4.5-95(b) was amended, effective July 1, 2021, to provide:

> (b) When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 *forcible* felony . . . after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now . . . classified in Illinois as a Class 2 or greater Class *forcible* felony . . . that defendant shall be sentenced as a Class X offender. This subsection does not apply unless:
>
> > (1) the first *forcible* felony was committed after February 1, 1978 (the effective date of Public Act 80-1099);
> >
> > (2) the second *forcible* felony was committed after conviction on the first;
> >
> > (3) the third *forcible* felony was committed after conviction on the second; and

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

730 ILCS 5/5-4.5-95 (2022)(emphasis added).

Under the amended statute, Mr. Brown does not qualify for a Class X sentence because he was not convicted of a forcible felony. He was originally sentenced on November 7, 2019, before this amendment became effective. (C. 64) Nevertheless, after a remand from the appellate court, his post-plea motion was ultimately denied on May 11, 2022, after the new and more favorable Class X recidivism provision had already taken effect. (R. 131-32)

As stated above, the appellate courts are split on this issue with the First and Second Districts holding that the amendment applies in Mr. Brown's situation, and the Third and Fourth Districts reaching the opposite conclusion. *Gray*, 2019 IL App (1st) 161646 -U; *Spears*, 2022 IL App (2d) 210583; *Foster*, 2022 IL App (3d) 210342-U; *Brown*, 2023 IL App (4th) 220400.

Representative of the former approach is the Second District's decision in *Spears*. In that case, the defendant entered an open guilty plea for which he was subject to mandatory Class X sentencing. He was sentenced on June 13, 2019, prior to the amendment of the mandatory Class X sentencing provision. 2022 IL App (2d) 210583, at ¶ 4. After the post-plea motion was denied, the defendant appealed and the case was remanded for further post-plea proceedings in compliance with Rule 604(d). 2022 IL App (2d) 210583, at ¶ 10. Subsequently, the trial court denied the motion to reconsider sentence on October 5, 2021, after the mandatory Class X sentencing provision was amended. 2022 IL App (2d) 210583, at ¶ 15.

On appeal, the defendant argued, as Mr. Brown does in the instant case, that he was entitled to elect to be sentenced under the amended Class X sentencing

provision. 2022 IL App (2d) 210583, at ¶ 19. The Second District agreed, reasoning that an opposite interpretation would create an absurd result because "had the trial court granted defendant's amended motion on any of the other grounds argued, the amended version of section 5-4.5-95(b) of the Code would have applied at defendant's new sentencing hearing, yet the State's position is that the amended provisions of the statute should not apply upon denial of that same motion." 2022 IL App (2d) 210583, at ¶ 28. Furthermore, the appellate court stated:

> Because defendant entered an open guilty plea, he could not file an appeal without first filing a motion to reconsider the sentence or a motion to withdraw his guilty plea, and it is the order denying his amended motion to reconsider the sentence that acts as the final judgment in the underlying proceedings. Until the trial court issued its denial of defendant's amended motion to reconsider the sentence following this court's February 19, 2020, remand, the underlying proceedings remained ongoing in the trial court when the amended provisions of section 5-4.5-95(b) of the Code took effect on July 1, 2021. This case was still pending before the trial court when the July 1, 2021, amendment to section 5-4.5-95(b) of the Code took effect. The amended version of that statute should have applied, and the trial court erred in denying defendant's amended motion to reconsider the sentence on that ground.
>
> 2022 IL App (2d) 210583, at ¶ 29 (internal citations omitted).

The Third District reached the opposite conclusion in *Foster*. In that case, the appellate court relied on *People v. Lisle*, 390 Ill. 327 (1945), which held that a change in the sentencing law "could only apply to those classes of cases in which a new law had become effective prior to the date of the actual sentence." *Foster*, 2022 IL App (3d) 210342-U, at ¶¶ 13, 14. The court further reasoned that, under 5 ILCS 70/4, the judgment was pronounced when the court initially entered the sentence and "the fact that defendant could ask the court to reconsider his sentence does not change the fact that the judgment had been pronounced." 2022 IL App (3d) 210342-U, at ¶ 15.

In the instant case, the Fourth District analyzed these two decisions and disagreed with *Spears* for three reasons. First, *Spears* did not address the above-quoted statement from *Lisle*. Next, *Spears* cited *People v. Feldman*, 409 Ill. App. 3d 1124 (5th Dist. 2011), for the proposition that the final judgment in a guilty plea was the denial of the motion to reconsider the sentence. However, *Feldman* was overruled by *People v. Walls*, 2022 IL 127965. Finally, the Fourth District looked to *Hunter*, which noted no absurdity from the fact that an amended sentencing law would not apply to a defendant whose case was pending on appeal even though it would apply if the case was remanded for resentencing for a different reason. *Brown*, 2023 IL App (4th) 220400, at ¶ 48.

Despite the Fourth District's reasoning, this Court should follow the holding of *Spears*. According to Section 4 of the Statute on Statutes, "the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding." 5 ILCS 70/4. Accordingly, the operative question in this case is whether it is "practicable" to apply an amended sentencing statute after a defendant has been sentenced, but while proceedings are still ongoing in the trial court. As this Court has previously stated: "'Practicable,' however, is not synonymous with 'convenient.' Rather, it means 'possible to practice or perform: capable of being put into practice, done, or accomplished: FEASIBLE.'" *People ex rel. Alvarez v. Howard*, 2016 IL 120729, ¶ 32 (quoting Webster's Third New International Dictionary 1780 (1993)). Here, it was feasible to resentence Mr. Brown because the trial court already had jurisdiction to do so based on the pending motion to reconsider sentence. In fact, "so long as the case was pending before it, the trial court had jurisdiction to reconsider any order which had previously been entered." *People v. Mink*, 141 Ill. 2d 163, 171 (1990).

This conclusion conforms with this Court's prior statement that a statute applies retroactively to pending cases, which this Court defined as "a case in which the trial court proceedings had begun under the old statute but had not yet been concluded." *People v. Hunter*, 2017 IL 121306, ¶ 30. Thus, the key is whether the case is pending in the trial court at a time after the statute becomes effective. In *Hunter*, the defendants' cases were pending on appeal when the new law took effect, and this Court concluded that the new sentencing law did not apply. 2017 IL 121306, at ¶¶ 46, 52-56. Conversely, in *Howard*, a new law was applied retroactively when the case was pending in the trial court. 2016 IL 120729, at ¶¶ 30-35. This distinction was explicitly adopted by the Second District in *People v. Calleros*, 2018 IL App (2d) 151256. In that case, the court found that *Hunter* was "clearly distinguishable" because the amendment at issue in *Calleros* occurred "*before* the trial court proceedings … had concluded." 2018 IL App (2d) 151256, at ¶ 8 (emphasis in original).

Drawing the line at the time when the trial court loses jurisdiction promotes judicial economy. When a case is pending on appeal, the retroactive application of a statute necessitates creating entirely new proceedings. *See People v. Easton*, 2018 IL 122187, ¶ 23 ("As a consequence, there were no 'ongoing proceedings' to which the amended rule would apply. The result of the appellate court's decision was to necessitate new proceedings in order to apply an amendment to a procedural rule that postdated the postplea proceedings."); *Hunter*, 2017 IL 121306, at ¶ 32 (holding that it was not feasible to apply an amended statute because when the statute became effective "nothing remain[ed] to be done" in the trial court). Conversely, here, no new proceedings would have been needed. The case was already pending in the trial court. Since the motion to reconsider sentence was pending,

the trial court already had the power to alter the sentence. Applying the amended statute in this situation would not have required an entirely new sentencing hearing as the trial judge could have simply applied the facts and argument from the original sentencing hearing to the new sentencing range. It is not unheard of for a trial judge to reduce a sentence following the presentation of a motion to reconsider sentence without holding a new sentencing hearing.

Therefore, a defendant should have the ability to elect to be sentenced on an amended statute so long as the case is pending in the trial court after the statute becomes effective. Undersigned counsel has not been able to locate any case from this Court where that procedure was not followed. The Fourth District cited *Lisle*, (*Brown*, 2023 IL App (4th) 220400, at ¶ 43), which states, "Section 4 of the act does not give the defendant the right to be sentenced under a law not in full force and effect at the time of his sentence." *Lisle*, 390 Ill. at 328. However, *Lisle* is distinguishable such that it does not control or even inform the issue in this case. In *Lisle*, the defendant was sentenced prior to the relevant statutory amendment. 390 Ill. at 328. Yet, the opinion does not specify whether that case was pending on appeal or in the trial court when the amendment became effective. Given that there is no mention of a post-sentencing motion in the summary of the facts in *Lisle*, it seems that the case was on appeal when the amendment became effective. Even if that were not the case, it simply cannot be said that the issue presented in the instant case was necessarily pending before this Court in *Lisle*, and, as such, it should not control the outcome here.

Similarly, this Court in *Hunter* stated that an amended statute could not apply to defendants "who were sentenced before the statute took effect." *Hunter*, 2017 IL 121306, at ¶ 52. Nevertheless, as explained above, the defendants' cases

in *Hunter* were pending on appeal when the new law took effect. 2017 IL 121306, at ¶ 46. Thus, compared to *Lisle*, *Hunter* provides even less justification for the Fourth District's conclusion because that case indisputably did not involve a situation where there were ongoing proceedings in the circuit court at a time when the amended statute was effective.

It is true that 5 ILCS 70/4 also says, "If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect." However, "the process of statutory construction requires more than mechanical application of a rule of law or a decision of this court," but also includes construing the statute to avoid absurd results. *Hunter*, 2017 IL 121306, at ¶ 28. As the Second District recognized in *Spears*, not applying the statute would create an absurd result because "had the trial court granted defendant's amended motion on any of the other grounds argued, the amended version of section 5-4.5-95(b) of the Code would have applied at defendant's new sentencing hearing, yet the State's position is that the amended provisions of the statute should not apply upon denial of that same motion." 2022 IL App (2d) 210583, at ¶ 28.

Indeed, this comports with the purpose of a motion to reconsider sentence, which is "to bring to the circuit court's attention *changes in the law*, errors in the court's previous application of existing law, and newly discovered evidence that was not available at the time of the hearing." *People v. Burnett*, 237 Ill. 2d 381, 387 (2010) (emphasis added). If a new statute could never apply retroactively after a defendant was sentenced, there would have been no reason for this Court to have included "changes in the law" as one of the purposes of a motion to reconsider sentence.

Finally, "penal statutes are strictly construed in favor of the defendant as a general matter." *People v. Whitney*, 188 Ill. 2d 91, 98 (1999). At the very least, Mr. Brown's interpretation is reasonable given the fact that four appellate court districts have addressed this issue and two of them have adopted his position. Accordingly, the rule of lenity also supports his interpretation.

Although this exact argument was not raised in the court below, a trial court's failure to advise the defendant of his right to elect a sentencing statute is not subject to normal forfeiture rules. *Hollins*, 51 Ill. 2d at 70. Rather:

> *Hollins* places an affirmative duty on the trial court to advise a defendant of his right to elect under which sentencing procedures defendant should be sentenced, namely, those in effect at the time the offense was committed or those in effect at the time of the sentencing hearing. Because no such advice was given in the present case, defendant cannot be found to have waived this argument on appeal.

People v. Strebin, 209 Ill. App. 3d 1078, 1081 (4th Dist. 1991).

Alternatively, this Court may review the issue as ineffective assistance of counsel. A defendant is constitutionally entitled to effective assistance of counsel. U.S. CONST. AMENDS. VI, XIV; ILL. CONST., ART. I, § 8. A motion to reconsider sentence is a critical stage of proceedings where the defendant is entitled to effective assistance of counsel. *People v. Owens*, 386 Ill. App. 3d 765, 771 (4th Dist. 2008). To establish an ineffective assistance of counsel claim, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Here, counsel was objectively unreasonable when he failed to argue that Mr. Brown should have been sentenced under the more favorable version of 730 ILCS 5/5-4.5-95(b). Counsel actually mentioned the amended statute at the post-plea

hearing, but did not argue that the amendment should be applied to the instant case. (R. 130-31) Effective counsel would have argued that Mr. Brown should be sentenced under the more-favorable version of the statute. For the reasons stated above, such an argument would have been successful and resulted in Mr. Brown not being sentenced as a Class X offender.

Finally, Mr. Brown acknowledges that, even if he was not subject to mandatory Class X sentencing, his nine-year sentence would still be within the extended-term range for Class 2 felonies. The normal sentencing range for Class 2 felonies is three to seven years. 730 ILCS 5/5-4.5-35(a) (2022). Mr Brown was eligible for an extended-term sentence based on his prior record. (C.I. 10); 730 ILCS 5/5-5-3.2(b)(1) (2022). Consequently, his sentencing range should have been three to fourteen years. 730 ILCS 5/5-4.5-35(a).

Even though Mr. Brown's nine-year sentence was within this range, a remand for resentencing is still required. Under the mistaken Class X sentencing range, the sentence was only three years over the minimum sentence. Yet, under the correct sentencing range, the same sentence was three times the minimum sentence and two years over the maximum non-extended Class 2 sentence. Indeed, a nine-year sentence is in the lower quarter of the Class X sentencing range, whereas it is over the midpoint of the extended-term Class 2 sentencing range. Other reviewing courts have remanded cases for resentencing where the court utilized the wrong sentencing range even when the defendant's ultimate sentence was within the proper sentencing range. *See, e.g., People v. Richards*, 2021 IL App (1st) 192154, ¶ 31; *People v. Hall*, 2014 IL App (1st) 122868, ¶ 15.

Mr. Brown respectfully requests that this Court vacate his Class X sentence and remand the matter for resentencing.

II.

Where defense counsel, at the post-plea hearing, withdrew the one issue raised in the post-plea motion and argued a separate issue not raised in the written motion, he left Mr. Brown with no appealable issues, thereby failing to comply with his duties under Rule 604(d).

Following a remand for lack of 604(d) compliance, post-plea counsel filed an amended motion to withdraw the guilty plea. This motion contained only one allegation – the vague claim that "the defendant did not understand the consequences or the effect the plea would have at that time." (C. 159) However, at the post-plea hearing, counsel abandoned any argument that the plea should be withdrawn, instead arguing that the sentence was excessive. (R. 129-30) Yet, no sentencing issue was raised in the post-plea motion. As such, counsel's own actions refuted the statement in his 604(d) certificate that he made all the necessary amendments to the post-plea motion. Therefore, if this case is not remanded for resentencing, it should at least be remanded for further post-plea proceedings.

Questions concerning compliance with Illinois Supreme Court rules, including defense counsel's compliance with Rule 604(d), are reviewed *de novo*. *People v. Gorss*, 2022 IL 126464, ¶ 10.

Supreme Court Rule 604(d) dictates the necessary procedure for perfecting an appeal following a guilty plea, which states, in pertinent part:

> No appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment.
>
> [***]
>
> The motion shall be in writing and shall state the grounds therefor. [***]

[***]

> Upon appeal any issue not raised by the defendant in the motion to reconsider the sentence or withdraw the plea of guilty and vacate the judgment shall be deemed waived.

Additionally, Rule 604(d) requires defense counsel to file a certificate stating that the attorney: (1) has consulted with the defendant either by phone, mail, electronic means or in person to ascertain defendant's contentions of error in the sentence and the entry of the plea of guilty; (2) has examined the trial court file and both the report of proceedings of the plea of guilty and the report of proceedings in the sentencing hearing; and (3) has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings. Counsel must strictly comply with this certificate requirement. *People v. Janes*, 158 Ill. 2d 27, 35 (1994). Because any issue not raised in a Rule 604(d) motion is waived, it is post-plea counsel's review of a defendant's case, as certified by the attorney certificate, that provides substantive meaning to a defendant's right to appeal. *People v. Neal*, 403 Ill. App. 3d 757, 760-61 (4th Dist. 2010).

Moreover, even when counsel files a facially-sufficient certificate, a reviewing court may consider the record where it shows that counsel failed to comply with Rule 604(d). *People v. Love*, 385 Ill. App. 3d 736, 739 (2d Dist. 2008). Whether a certificate is refuted "does not depend on a showing of ineffective assistance of counsel" because "the dispositive question is simply whether the proceedings below were in strict compliance with Rule 604(d)." *People v. Bridges*, 2017 IL App (2d) 150718, ¶ 6 n.1 (internal citations omitted). Likewise, whether the underlying claim in the post-plea motion is ultimately meritorious "has no bearing on whether counsel complied with Rule 604(d)." *People v. Winston*, 2020 IL App (2d) 180289, ¶ 18.

A facially-valid certificate can be refuted by evidence on the record that post-plea counsel did not properly amend the post-plea motion. For example, in *Winston*, post-plea counsel raised a new issue at the post-plea hearing that was not included in the written motion to withdraw the guilty plea. The failure to do so refuted counsel's 604(d) certificate. 2020 IL App (2d) 180289, at ¶¶15-16. The appellate court concluded, "We fail to see how counsel could raise a new claim at the hearing and yet deem it unnecessary to amend the motion to include that claim." 2020 IL App (2d) 180289, at ¶ 18.

Similarly, in *People v. Willis*, 2015 IL App (5th) 130020, ¶13, defense counsel, at the post-plea hearing, raised an issue that was not in the written post-plea motion. The appellate court found that defense counsel, by making this additional argument, refuted his own 604(d) certificate because it showed that he had not made the necessary amendments to the post-plea motion. 2015 IL App (5th) 130020, at ¶ 20. As a result, the court remanded the case for further post-plea proceedings. 2015 IL App (5th) 130020, at ¶ 26.

Also, in *People v. Little*, 337 Ill. App. 3d 619, 620 (4th Dist. 2003), following an open guilty plea and sentencing, defense counsel filed a motion to reconsider sentence, which stated in its entirety: "Comes now defendant by his attorney [defense counsel] and moves for a reduction of his sentence pursuant to 730 ILCS 5/5-8-1(c)." At the hearing on this motion, defense counsel told the court, "This motion is here, your Honor, only for one reason, and that is, I must statutorily comply when there's a plea, to move to reconsider. That's a form argument only, your Honor. And that's it." 337 Ill. App. 3d at 621. On appeal, the Fourth District found that counsel failed to comply with Rule 604(d) for two independent reasons. First, the transcript of the guilty plea were not prepared until after counsel filed his 604(d) certificate.

337 Ill. App. 3d at 621-22. Second, the written motion to reconsider did not state any reasons to support counsel's request, which "left defendant with no issues upon which to appeal." The Fourth District concluded, "The mere act of filing a motion to reconsider sentence, a condition precedent to filing an appeal, without including any grounds in support of the motion, cannot be considered strict compliance with Rule 604(d) because defendant is left with no appealable issues." 337 Ill. App. 3d at 622 (internal citations omitted).

In Mr. Brown's case, defense counsel also filed a facially-sufficient Rule 604(d) certificate, (C. 170), but counsel's own actions refuted that certificate. Following a remand from the appellate court, defense counsel filed a "Motion to Withdraw Guilty Plea and Vacate Sentence." In its entirety, the motion stated:

> NOW COMES the defendant, Alvin Brown, by his attorney Russell J. Luchtenburg, and moves this Honorable Court to enter an Order withdrawing the plea of guilty and to vacate the sentence and in support thereof, the defendant states as follows:
>
> 1: On November 7, 2019, the defendant entered a plea of guilty and was sentenced to the Illinois Department of Corrections for a period of nine years and three years for mandatory supervised reporting.
>
> 2: The defendant is currently detained in the Shawnee Correctional Center in Vienna, Illinois.
>
> 3: The defendant did not understand the consequences or the effect the plea would have at that time.
>
> WHEREFORE, the defendant respectfully requests as follows:
>
> 1: Grant this motion and enter an order vacating the plea of guilty.
>
> 2: Set this matter for a pretrial conference, and
>
> 3: Grant any other relief that this Court deems just and proper.

(C. 159)

However, at the post-plea hearing, defense counsel told the court that Mr. Brown was withdrawing any argument that his guilty plea should be withdrawn and instead was proceeding on a motion to reconsider sentence. (R. 129) The problem with this course of action was that there was no sentencing claims in the written post-plea motion. By not including any sentencing argument in the written motion, counsel waived it for appeal. S.Ct. R. 604(d); *People v. Stevens*, 297 Ill. App. 3d 408, 412 (1st Dist. 1998); *Neal*, 403 Ill. App. 3d at 760-61. Therefore, counsel withdrew the one issue that would have been preserved for appeal, instead arguing an issue that was not preserved for appeal. The end result was that Mr. Brown was left with zero appealable issues.

As in *Winston* and *Willis*, the failure to amend the written motion to include a claim that was orally argued at the post-plea hearing demonstrated that counsel did not comply with his responsibility under Rule 604(d) to make the necessary amendments to the post-plea motion. *Winston*, 2020 IL App (2d) 180289, at ¶¶15-16; *Willis*, 2015 IL App (5th) 130020, at ¶ 20. Even the Fourth District's own precedent in *Little* showed that counsel in the instant case failed to comply with Rule 604(d). In fact, counsel in *Little* did more for his client by at least filing a written motion to reconsider sentence, albeit without including any substantive issues in the motion. Mr. Brown's attorney did not even take this *pro forma* step as he did not file any motion to reconsider sentence.

Based on the record, it seems as if Mr. Brown may have changed his mind on what post-plea motion he wanted to pursue on the day of the post-plea hearing. Yet even if that is what occurred, it still does not mean that counsel complied with Rule 604(d). If Mr. Brown changed his mind at the last minute, counsel needed to continue the case, file an amended motion with specific allegations regarding

the sentence, and file a new 604(d) certificate. Counsel could not simply plow ahead with a post-plea hearing that resulted in no issues being preserved for appeal.

Likewise, the fact that Mr. Brown filed a *pro se* motion to reconsider sentence before his case was remanded to the trial court did not cure counsel's failings for multiple reasons. First, counsel never explicitly adopted Mr. Brown's motion to reconsider sentence. Second, even if counsel had adopted the *pro se* motion, he still needed to do more to fulfill his duties under Rule 604(d) because the *pro se* motion contained no allegations or arguments regarding why the sentence should be reduced. (C. 75-76) Again, without any specific allegations regarding why the sentence was excessive, there were no issues preserved for appeal. *Little*, 337 Ill. App. 3d at 622. Thus, to satisfy his 604(d) responsibility, counsel needed to do more than just adopt the *pro se* motion. He needed to amend it to add at least *some* allegations particular to this case.

Nevertheless, the Fourth District in instant case reached the opposite conclusion, holding, "because the excessive sentence claim was presented to and considered by the court, it was preserved for review and could have been raised by defendant on appeal." *People v. Brown*, 2023 IL App (4th) 220400, ¶ 60. This holding ignores the plain language of Rule 604(d). *See People v. Campbell*, 224 Ill. 2d 80, 87 (2006) (Supreme Court Rules "are not suggestions; rather, they have the force of law, and the presumption must be that they will be obeyed and enforced as written."). Specifically, the Fourth District's conclusion makes superfluous the portions of Rule 604(d) which state: "The motion shall be in *writing* and shall state the grounds therefor," and "Upon appeal any issue not raised by the defendant in the motion to reconsider the sentence … *shall be deemed waived*." S. Ct. R. 604(d) (emphasis added); *see also People v. Casas*, 2017 IL 120797, ¶ 18 ("Each word,

clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous.").

In addition to contradicting the plain language of Rule 604(d), the Fourth District also implicitly repudiates well-established case law holding that the failure to include an issue in a written motion waives it for purpose of appeal. *Stevens*, 297 Ill. App. 3d at 412; *Neal*, 403 Ill. App. 3d at 760-61; *Little*, 337 Ill. App. 3d at 622. The Fourth District, cited only one case, *People v. Heider*, 231 Ill. 2d 1 (2008), to support the notion that an issue was preserved for appeal despite not being included in the written post-plea motion. *Brown*, 2023 IL App (4th) 220400, at ¶ 60.

However, *Heider* is distinguishable from Mr. Brown's case. In *Heider*, the defendant, in the motion to reconsider sentence, "expressly mentioned his 'diminished mental functioning.'" 231 Ill. 2d at 15. On appeal, the defendant argued that the trial court improperly treated the defendant's mental retardation as an aggravating factor at sentencing. 231 Ill. 2d at 14. This Court held that the defendant sufficiently preserved this issue for appeal, stating, "defendant is not asserting in this court *a completely different objection* from the one he raised below." 231 Ill. 2d at 18 (emphasis added). The First District has interpreted *Heider* as concluding that "despite some differences in presentation, the issue *was* raised *both* at the sentencing hearing and in the postsentencing motion, as forfeiture principles ordinarily require." *People v. Tatum*, 2019 IL App (1st) 162403, ¶ 78 (emphasis in original). Conversely, in Mr. Brown's case, no sentencing issue was raised in the written motion. Indeed, counsel did not even file a written motion to reconsider sentence. Accordingly, *Heider* involved the sufficiency of an allegation that was raised in a written motion, whereas Mr. Brown's case involves the complete

lack of a written motion. As such, *Heider* does not justify the Fourth District's departure from the plain language of Rule 604(d).

The Fourth District also cited this Court's decision in *People v. Shirley*, 181 Ill. 2d 359 (1998), to hold that a further remand was unnecessary where Mr. Brown "was afforded a full and fair second opportunity to present his motion for reconsideration of his sentence." *Brown*, 2023 IL App (4th) 220400, at ¶¶ 57-61. Upon closer inspection of the Fourth District's reasoning, the cite to *Shirley* was not a separate and distinct reason to affirm. Instead, the Fourth District found that Mr. Brown received a full and fair hearing based, in part, on its faulty conclusion that counsel had preserved an excessive sentence argument for appeal. 2023 IL App (4th) 220400, at ¶ 60.

Moreover, *Shirley* is distinguishable from the instant case. In *Shirley*, there was no argument that the 604(d) certificate was insufficient on its face or that it was refuted by the record. Instead, the problem was that the certificate was not filed at the correct time. *Shirley*, 181 Ill. 2d at 367; *see also People v. Evans*, 2017 IL App (3d) 160019, ¶ 26 ("Thus, the issue in *Shirley* was one of timing."). *Shirley* stands for the proposition that "a technical shortcoming such as the mistimed filing of a Rule 604(d) certificate should be forgiven to avoid multiple remands, as long as the defendant had received a full and fair hearing." *Evans*, 2017 IL App (3d) 160019, at ¶ 26. Stated differently, "the holding in *Shirley* does not create a bar on successive Rule 604(d) remands when appropriate." *People v. Hagerstrom*, 2016 IL App (3d) 140559, ¶ 12.

Here, unlike in *Shirley*, there was a substantive, not a technical, violation of Rule 604(d). By failing to preserve any issues for appellate review, post-plea counsel completely failed to comply with one of his three substantive responsibilities

under Rule 604(d). As the Second District has stated, "where compliance with the substantive requirements of Rule 604(d) is doubtful, so is the fairness of the proceedings." *Love*, 385 Ill. App. 3d at 739. When representing a defendant in a motion to reconsider sentence, one of the most important duties, if not the most important, is to preserve sentencing issues for appellate review. Here, counsel completely failed at that duty. For these reasons, Mr. Brown simply did not receive a full and fair hearing where his attorney left him bereft of any preserved issues.

In conclusion, this Court must vacate the denial of Mr. Brown's post-plea motion and remand the case for: (1) the filing of a valid Rule 604(d) certificate; (2) the opportunity to file a new post-plea motion; and (3) a new motion hearing. *Bridges*, 2017 IL App (2d) 150718, at ¶ 12.

CONCLUSION

For the foregoing reasons, Alvin Brown, Defendant-Appellant, respectfully requests that this Court vacate his Class X sentence and remand the matter for resentencing in the extended-term Class 2 sentencing range, or, alternatively, vacate the denial of his post-plea motion and remand the case for: (1) the filing of a valid Rule 604(d) certificate; (2) the opportunity to file a new post-plea motion; and (3) a new motion hearing.

Respectfully submitted,

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COUNSEL FOR DEFENDANT-APPELLANT

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 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 29 pages.

/s/Christopher McCoy
CHRISTOPHER MCCOY
Assistant Deputy Defender

No. 129585

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- ALVIN BROWN, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-22-0400. There on appeal from the Circuit Court of the Seventeenth Judicial Circuit, Boone County, Illinois, No. 17-CF-202. Honorable C. Robert Tobin III, 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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Ms. Tricia L Smith, Boone County State's Attorney, 601 N. Main St., Suite 302, Belvidere, IL 61008, stateatty@boonecountyil.org, tsmith@boonecountyil.org;

Mr. Alvin Brown, Register No. A50569, East Moline Correctional Center, 100 Hillcrest Road, East Moline, IL 61244

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On October 26, 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 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 Brief and Argument to the Clerk of the above Court.

/s/Norma Huerta
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APPENDIX TO THE BRIEF

Alvin Brown No.

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
BOONE COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-22-0400
	)	Circuit Court No: 2017CF202
	)	Trial Judge: Tobin III
v	)	
	)	
	)	
BROWN, ALVIN	)	
Defendant/Respondent	)	

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FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
BOONE COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-22-0400
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	)	Trial Judge: Tobin III
v	)	
	)	
	)	
BROWN, ALVIN	)	
Defendant/Respondent	)	

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FOURTH JUDICIAL DISTRICT
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PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-22-0400
	)	Circuit Court No: 2017CF202
	)	Trial Judge: Tobin III
v	)	
	)	
	)	
BROWN, ALVIN	)	
Defendant/Respondent	)	

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FOURTH JUDICIAL DISTRICT
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PEOPLE	)	
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v	)	
	)	
	)	
BROWN, ALVIN	)	
Defendant/Respondent	)	

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BOONE COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-22-0400
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v	)	
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BROWN, ALVIN	)	
Defendant/Respondent	)	

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BOONE COUNTY, ILLINOIS

PEOPLE	)	
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BROWN, ALVIN	)	
Defendant/Respondent	)	

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FOURTH JUDICIAL DISTRICT
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PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-22-0400
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Defendant/Respondent	)	

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FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
BOONE COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-22-0400
	)	Circuit Court No: 2017CF202
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v	)	
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	)	
BROWN, ALVIN	)	
Defendant/Respondent	)	

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IN THE CIRCUIT COURT OF BOONE COUNTY, ILLINOIS
17TH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS
vs. Case No. **17CF202**
Alvin Brown Jr.
Defendant Date of Sentence: **11/7/19** Date of Birth: **5/11/55** Victim's Date of Birth: **N/A**

JUDGMENT – SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHEREAS the above-named defendant has been adjudged guilty of the offenses enumerated below; IT IS THEREFORE ORDERED that the defendant be and hereby is sentenced to confinement in the Illinois Department of Corrections for the term of years and months specified for each offense.

COUNT	OFFENSE	DATE OF OFFENSE	STATUTORY CITATION	CLASS	SENTENCE	MSR
1	**Driving While Driver's License is Revoked**	**6/3/17**	**625 ILCS 5/6-303(d-5)**	**2**	**9** Yrs. **0** Mos.	**3** Yrs.
to run concurrent with counts(s): _____			and served at ☒ 50% ☐ 75% ☐ 85% ☐ 100% pursuant to 730 ILCS 5/3-6-3			
_____	_____	_____	_____	_____	_____ Yrs. ___ Mos.	___ Yrs.
to run concurrent with counts(s): _____			and served at ☐ 50% ☐ 75% ☐ 85% ☐ 100% pursuant to 730 ILCS 5/3-6-3			

The Court finds that the defendant is:

☒ Convicted of a class **2** offense but sentenced as a class X offender pursuant to 730 ILCS 5/5-4.5-95(b) on count(s) **1**.

☒ The court further finds that the defendant is entitled to receive credit for time actually served in custody (of **220** days as of the date of this order) from (specify dates): **6/3/17; 4/2/19-11/6/19**
☒ The defendant remained in continuous custody from the date of this order.
☐ The defendant did not remain in continuous custody from the date of this order (less _____ days from a release date of _____ to a surrender date of _____).

☐ The Court further finds that the conduct leading to conviction for the offenses enumerated in counts _____ resulted in great bodily harm to the victim (730 ILCS 5/3-6-3(a)(2)(iii)).

☐ The Court further finds that the defendant meets the eligibility requirements and is approved for placement in the Impact Incarceration Program (730 ILCS 5/5-4-1(a)).

☒ The Court further finds that offense was committed as a result of the use of, abuse of, or addiction to alcohol or a controlled substance and recommends the defendant for placement in a substance abuse program (730 ILCS 5/5-4-1(a)).

☐ The defendant successfully completed a full time (60-day or longer) ☐ Pre-Trial Program; ☐ Educational/Vocational; ☐ Substance Abuse; ☐ Behavior Modification; ☐ Life Skills; ☐ Re-Entry Planning – provided by the county jail while held in pretrial detention prior to his commitment and shall be awarded additional sentence credit in accordance with 730 ILCS 5/3-6-3(a)(4) for _____ total number of days of program participation, if not previously awarded.

☐ The defendant passed the high school level test for General Education and Development (GED) on _____ while held in pre-trial detention prior to this commitment and is eligible to receive Pre-Trial GED Program Credit in accordance with 730 ILCS 5/3-6-3(a)(4.1). THEREFORE IT IS ORDERED that the defendant shall be awarded 60 days of additional sentence credit, if not previously awarded.

☒ IT IS FURTHER ORDERED that the sentence(s) imposed on count(s) **1** be consecutive to the sentenced imposed in case number **17CF607** In the Circuit Court of **Winnebago County, Illinois.**

☒ IT IS FURTHER ORDERED that **the defendant pay an assessment pursuant to the Gavel Order, reduced to judgment and sent to collections.**

The clerk of the Court shall deliver a certified copy of this order to the Sheriff. The Sheriff shall take the defendant into custody and deliver defendant to the Department of Corrections which shall confine said defendant until expiration of this sentence or until otherwise released by operation of law.
This order is (☒) effectively immediately (☐ stayed until _____).

DATE: **11/7/19** ENTER: _____ C 64
Honorable C. Robert Tobin III

PEOPLE VS. BROWN, ALVIN

		Judge	CR
	to Withdraw Guilty Plea and Vacate Sentence would be adrressed in		
	court as it was filed previously. **		
03/25/2022	Motion to Withdraw Guilty Plea and Vacate Sentence		
	P by Sierens. Atty Luchtenburg ps for Def. By agreement, case	CRT	ER
	is set for status or possible hearing on Def's motion to	CRT	ER
	withdraw GP on 4-21-22 at 9:00 a.m. video writ shall issue.	CRT	ER
	Motion/withdraw set for 04/21/2022 at 9:00 in courtroom 1.		
03/29/2022	VIDEO WRIT	RAS	000
	Forwarded to Shawnee Correctional Center	RAS	000
04/01/2022	Petition For Attorney Fees		
04/11/2022	PROPOSED ORDER		
04/21/2022	P by Sierens ps virtually. Def ps virtually from Shawnee IDOC.	CRT	ER
	Atty Luchtenburg ps for Def. Case is continued to 5-11-22 at	CRT	ER
	10:00 a.m. for hrg on Def's motion to withdraw GP.	CRT	ER
	SA given leave to issue video writ	CRT	ER
04/22/2022	Motion/withdraw set for 05/11/2022 at 10:00 in courtroom 1.		
04/25/2022	PERSONS TO APPEAR BY VIDEO ORDER OF APPEARANCE		
04/27/2022	Petition for Attorney Fees		
04/28/2022	PROPOSED ORDER		
05/11/2022	P by Sierens. Def ps in custody of Shawnee CC virtually.	CRT	ER
	APD Luchtenburg ps for Def. Case comes on for hrg on	CRT	ER
	Def's motion to withdraw guilty plea. Def has had a phone	CRT	ER
	meeting with his atty. Atty enters a 604(d) certificate	CRT	ER
	instanter. Atty wishes to proceed with motion to reconsider.	CRT	ER
	Arguments are presented and motion is heard and denied.	CRT	ER
	Def is to file notice to appeal.	CRT	ER
	CERTIFICATE OF COUNSEL PURSUANT TO ILLINOIS SUPREME COURT RULE 604(d)	CRT	ER
05/13/2022	Notice of Appeal		
	Motion For Appointment Of Counsel On Appeal And For A Free Transcript		
	ORDER APPOINTING APPELLATE DEFENDER AND FOR FREE TRANSCRIPT	CRT	000
	Filing Submitted - Notice of Appeal		
	Filing Submitted - Order Appointing Appellate Defender		
	Filing Accepted - Notice of Appeal		
	Filing Accepted - Order Appointing Appellate Defender		
	Appellate Court Letter		

No. 4-22-0400

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of
	)	the Seventeenth Judicial Circuit,
Plaintiff-Appellee,	)	Boone County, Illinois
	)	
-vs-	)	No. 17-CF-202
	)	
ALVIN BROWN,	)	
	)	Honorable
Defendant-Appellant.	)	Robert Tobin,
	)	Judge Presiding.

AMENDED NOTICE OF APPEAL

An appeal is taken to the Appellate Court, Fourth Judicial District:

Appellant(s) Name:	Mr. Alvin Brown
Appellant's Address:	Shawnee Correctional Center 6665 State Route 146 East Vienna, IL 62995
Appellant(s) Attorney:	Office of the State Appellate Defender
Address:	400 West Monroe Street, Suite 303 Springfield, IL 62704
Offense of which convicted:	Driving While Drivers License Revoked
Date of Judgment or Order:	May 11, 2022
Sentence:	9 years in prison
Nature of Order Appealed:	Conviction, Sentence, and Denial of Post-Plea Motion

/s/ Catherine K. Hart
CATHERINE K. HART
ARDC No. 6230973
Deputy Defender

Rec 3 13 2023

2023 IL App (4th) 220400

NO. 4-22-0400

FILED
March 13, 2023
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Boone County
ALVIN BROWN,	)	No. 17CF202
Defendant-Appellant.	)	
	)	Honorable
	)	Robert Tobin,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court, with opinion.
Justices Doherty and Lannerd concurred in the judgment and opinion.

OPINION

¶ 1 Defendant, Alvin Brown, pleaded guilty to driving while license revoked (DWLR) (625 ILCS 5/6-303(a), (d-5) (West 2016)). Based on his criminal history, the trial court sentenced him as a Class X offender to nine years in prison under section 5-4.5-95(b) of the Unified Code of Corrections (Code) (730 ILCS 5/5-4.5-95(b) (West 2018)). During postplea proceedings, defendant moved for reconsideration of his sentence, which the court denied. Defendant appeals, arguing (1) he is entitled to a remand for resentencing because he was not given the opportunity "to elect the benefit of" amendments to section 5-4.5-95(b), which made the statute inapplicable to his case and took effect after his sentencing but before the court ruled on his postplea motion and (2) the record refutes his postplea counsel's certification of compliance with the requirements of Illinois Supreme Court Rule 604(d) (eff. July 1, 2017), entitling him to further postplea

proceedings. We affirm.

¶ 2 I. BACKGROUND

¶ 3 In July 2017, a grand jury indicted defendant on one count of DWLR (625 ILCS 5/6-303(a), (d-5) (West 2016)). The offense was charged as a Class 2 felony and based on allegations that, on or about June 3, 2017, defendant drove a motor vehicle at a time when (1) his driving privileges were revoked for committing a driving under the influence (DUI) offense and (2) he had 14 prior violations for DWLR.

¶ 4 In October 2019, defendant entered an open plea of guilty to the charged offense. At his guilty plea hearing, the trial court admonished defendant regarding the rights he was giving up and the consequences he faced by pleading guilty. Such consequences included defendant's potential eligibility for sentencing as a Class X offender—with a sentencing range of 6 to 30 years in prison—based upon his criminal history. Defendant asserted that he understood the court's admonishments and persisted in his plea. According to the State's factual basis, on June 3, 2017, a Boone County Sheriff's deputy heard a call about a retail theft "where the offender, a black female, left in a red Ford truck being driven by a black male." The deputy subsequently "saw that vehicle *** and stopped it." The driver identified himself as defendant. The deputy "had dispatch run [defendant's] information" and learned that defendant's driver's license was revoked for a DUI conviction and that defendant had "at least 14 prior violations" for DWLR. Ultimately, the court accepted defendant's guilty plea, finding defendant understood his rights and that his plea was voluntary.

¶ 5 In November 2019, the trial court conducted defendant's sentencing hearing. At the time of sentencing, section 5-4.5-95(b) of the Code (730 ILCS 5/5-4.5-95(b) (West 2018)) provided as follows:

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

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

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

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

¶ 6 Defendant's presentence investigation report (PSI) showed defendant was 64 years old and had a lengthy criminal history that dated back to 1972. His criminal history included convictions for burglary, theft, battery, disorderly conduct, rape, robbery, forgery, DUI, and multiple convictions for driving with his license suspended or revoked. Several times, defendant had been sentenced to terms of imprisonment in the Illinois Department of Corrections (DOC). In 2009, he was sentenced to seven years in prison for the offenses of forgery and DWLR. In March 2017, he was arrested for DWLR in Winnebago County case No. 17-CF-607, and, in 2019, sentenced to six years in prison for that offense. While case No. 17-CF-607 was pending, defendant committed the underlying offense.

¶ 7 In presenting evidence to the trial court, the State submitted a certified copy of defendant's driving abstract, which showed his driver's license was revoked in July 1997 for a DUI offense and that he subsequently had 14 DWLR violations. To support defendant's eligibility for Class X sentencing, the State presented exhibits showing that defendant had prior felony

convictions for (1) burglary, a Class 2 offense committed in September 1978, and (2) rape, a Class X offense committed in July 1981. Finally, the State also submitted an exhibit containing information pertaining to Winnebago County case No. 17-CF-607, which indicated defendant was on bond in that case at the time he committed the underlying offense. Defendant's evidence included his own testimony and the testimony of several of his family members.

¶ 8 The State recommended that the trial court sentence defendant to a 10-year term of imprisonment, noting defendant's criminal history, the need for deterrence, and that defendant committed the underlying offense "while out on bond on another felony." Defendant's counsel asked the court to impose a six-year prison sentence based on defendant's history of drug addiction and his family ties. The record reflects counsel also advocated for sentencing defendant as a Class 2 offender, arguing that imposition of a Class X sentence would result in an improper "double enhancement." The court rejected defense counsel's argument, stating Class X sentencing applied. It sentenced defendant to nine years in prison and ordered his sentence to be served consecutively with the sentence imposed in Winnebago County case No. 17-CF-607.

¶ 9 In December 2019, defendant *pro se* filed motions to withdraw his guilty plea and vacate his sentence, reduce his sentence, and for the appointment of counsel. In connection with his motion to withdraw, defendant alleged he was forced to plead guilty because his attorney told him he would be given a 20-year prison sentence if he elected to go to trial and lost. Defendant's motion for a reduction of his sentence did not set forth any specific allegations. The same month, the trial court appointed new counsel, attorney Russell Luchtenberg, to represent defendant during his postplea proceedings.

¶ 10 In July 2020, Luchtenberg filed a certificate of compliance pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2017), representing that he had consulted with defendant

by phone "to ascertain defendant's contentions of error in the sentence," "examined the trial court file and *** report of proceedings in the sentencing hearing," and elected not to file any amended motion.

¶ 11 The same date the certificate was filed, the trial court conducted a hearing on defendant's postplea motions. Luchtenberg asserted he had spoken with defendant and found no basis upon which to amend defendant's pleadings. He also indicated defendant wanted to pursue only his motion to reduce his sentence and not his motion to withdraw his guilty plea and vacate his sentence. Upon inquiry by the court, defendant acknowledged that he no longer wanted to withdraw his guilty plea. Regarding defendant's sentence, Luchtenberg stated it was defendant's belief that there were "improper calculations made" regarding his eligibility for Class X sentencing, that his nine-year sentence was excessive, and that he should have been sentenced as a Class 2 offender. Luchtenberg also asked the court to "take a look at the sentencing again and *** reconsider" defendant's sentence. He noted defendant was "not a young man" and "currently going to be incarcerated for six years" in connection with his previous DWLR case. The court denied defendant's motion, finding he had been eligible for Class X sentencing based on his criminal history and that a nine-year sentence "was appropriate."

¶ 12 Defendant appealed the trial court's denial of his postplea motion. On appeal, he filed an unopposed motion for summary remand, alleging Luchtenberg failed to comply with Rule 604(d) by filing a deficient certificate of compliance. In particular, he noted that Luchtenberg failed to "certify that he consulted with [defendant] about both his contentions of error in the guilty plea and the sentencing hearing." Defendant requested the matter be remanded for compliance with Rule 604(d) and further postplea proceedings.

¶ 13 In December 2020, the appellate court granted defendant's motion for summary

remand. In doing so, it vacated the trial court's denial of defendant's postplea motion and remanded the matter to the trial court for the filing of a valid Rule 604(d) certificate, the opportunity for defendant to file new postplea motions, and a new postplea motion hearing. *People v. Brown*, No. 2-20-0432 (Dec. 4, 2020) (unpublished summary order under Illinois Supreme Court Rule 23(c)) (granting defendant's unopposed motion for summary remand).

¶ 14 On remand, the parties first appeared before the trial court for a status hearing in January 2021. At the hearing, the court inquired whether Luchtenberg had communicated with defendant regarding whether he "would like to have a new hearing on the motion to withdraw." Luchtenberg represented that he and defendant "did have a discussion regarding that" and that he believed defendant was "ready to just have [Luchtenberg] prepare another 606 604(d) [certificate]." Upon inquiry by the court, defendant stated he was "okay with [Luchtenberg] doing the certificate, [and] sending it back to the appeal court." The court then stated it would set no further court dates and indicated appellate proceedings could resume once Luchtenberg filed a certificate in compliance with Rule 604(d).

¶ 15 In February 2021, Luchtenberg filed a new Rule 604(d) certificate. He asserted as follows:

> "1. I have consulted with the Defendant in person, by mail, by phone or by electronic means to ascertain the defendant's contentions of error in the entry of the plea of guilty and in the sentence;
>
> 2. I have examined the trial court file and report of proceedings of the guilty plea and the report of proceedings in the sentencing hearing; and
>
> 3. I have made any amendments to the motion necessary for the adequate presentation of any defects in those proceedings."

¶ 16 Effective July 1, 2021, the legislature amended section 5-4.5-95(b) (see Pub. Act 101-652, § 10-281 (eff. July 1, 2021) (amending 730 ILCS 5/5-4.5-95(b))). The amended version of the statute provided that for Class X sentencing to apply, a defendant had to be convicted of "a Class 1 or Class 2 forcible felony" offense and have prior qualifying convictions that were also forcible felonies. *Id.*

¶ 17 In March 2022, the attorneys in defendant's case appeared before the trial court. Luchtenberg indicated his intention to file an amended postplea motion that "track[ed]" with defendant's previous filings. He also asserted that he needed more time to communicate with defendant to determine "if we're going to do the same thing we did before[.]" The court set the matter for further hearing. The same day, Luchtenberg filed a motion to withdraw guilty plea and vacate sentence on defendant's behalf, alleging "defendant did not understand the consequences or the effect the plea would have at that time."

¶ 18 In April 2022, the trial court conducted a status hearing at which the attorneys in the case and defendant appeared. Luchtenberg indicated defendant was not yet ready to proceed with his motion to withdraw and that they still needed to speak "personally *** about what we're doing."

¶ 19 In May 2022, the trial court conducted a postplea hearing in the matter. Luchtenberg represented that he had communicated with defendant by telephone and presented a third Rule 604(d) certificate. Similar to his February 2021 certificate, he alleged as follows:

> "1. I have consulted with the Defendant in person or by mail to ascertain the defendant's contentions of error in the entry of the plea of guilty and in the sentence;
>
> 2. I have examined the trial court file and report of proceedings of the plea

of guilty and the sentencing; and

3. I have made any amendments to the motion necessary for the adequate presentation of any defects in those proceedings."

¶ 20 The trial court informed defendant that Luchtenberg's certificate stated he and defendant had discussed defendant's "different options on the motion to withdraw guilty plea." The court asked defendant if he thought he had "enough time to speak with [Luchtenberg] about all those issues" and defendant stated, "Yes." Luchtenberg then informed the court that defendant would not be pursuing his motion to withdraw his guilty plea and that "[w]hat we're doing is going back to what he had brought up at the past hearing which was the—whether or not the consequences of the sentence would be reconsidered." As a basis for reconsideration, Luchtenberg noted "several things that have gone on within the law," and stated as follows:

> "[O]ne of the things would be the enhancement of his sentence. While it's not retroactive based on his record on what he was convicted of, it was enhanced because of reasons that would not apply today and so we're asking if the Court just on the basis of justice would take a look back."

Luchtenberg also asserted that he was stipulating to the arguments made at defendant's July 2020 postplea hearing.

¶ 21 The trial court indicated it recognized that Luchtenberg was stipulating to arguments made at the prior hearing "[w]ith the only difference [being that] the Class X rule has changed since [that prior hearing]." After the State confirmed that the statutory changes were not "retroactive," the court stated it understood and agreed that defendant faced an extended-term sentence of "3 to 14 either way." Again, the court denied defendant's postplea motion, finding the nine-year sentence it imposed "was appropriate" and "proper," and "merited" by defendant's

"continued actions."

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 A. Defendant's Entitlement to Remand for Resentencing Based on Statutory Sentencing Amendments

¶ 25 On appeal, defendant first argues that his 9-year sentence must be vacated and the matter remanded "for resentencing in the extended-term Class 2 sentencing range of [3 to 14] years." He concedes that at the time of his sentencing in November 2019, he was eligible for mandatory Class X sentencing pursuant to section 5-4.5-95(b) of the Code (730 ILCS 5/5-4.5-95(b) (West 2018)). Nevertheless, he notes that before the conclusion of his postplea proceedings in May 2022, section 5-4.5-95(b) was amended to apply only to forcible felony offenses, rendering that section inapplicable to his underlying offense (Pub. Act 101-652, § 10-281 (eff. July 1, 2021) (amending 730 ILCS 5/5-4.5-95(b))) and making him no longer eligible for Class X sentencing. According to defendant, because the judgment in his case "was not yet final and *** still pending in the [trial] court" when the amendment took effect, it must be given retroactive application and he should be given the opportunity to elect sentencing under the new law.

¶ 26 Initially, the State argues defendant forfeited any claim that he is entitled to elect sentencing under the amended version of section 5-4.5-95(b) because he did not raise it in a postsentencing motion to reconsider. Defendant acknowledges that he did not "rel[y] on a "retroactivity argument" below when seeking reconsideration of his sentence; however, he contends normal forfeiture rules are relaxed when the issue involves the right to elect the application of an amended sentencing statute. Additionally, he argues his claim may be reviewed based upon either the occurrence of second-prong plain error or because his postplea counsel

provided ineffective assistance by not raising the issue.

¶ 27 Forfeiture involves "the failure to make a timely assertion of a known right." *People v. Bowens*, 407 Ill. App. 3d 1094, 1098, 943 N.E.2d 1249, 1256 (2011). Generally, "a defendant forfeits appellate review of any sentencing issue not raised in the trial court in a written postsentencing motion." *People v. Lewis*, 234 Ill. 2d 32, 42, 912 N.E.2d 1220, 1226 (2009); see Ill. S. Ct. R. 604(d) (eff. July 1, 2017) ("Upon appeal any issue not raised by the defendant in the motion to reconsider the sentence or withdraw the plea of guilty and vacate the judgment shall be deemed waived.").

¶ 28 Here, we agree that, before the trial court, defendant did not raise a claim that he was entitled to resentencing so that the new, amended version of section 5-4.5-95(b) of the Code could be retroactively applied to his case. No such claim was set forth in any written postsentencing motion, nor was it presented orally at defendant's May 2022 postplea hearing. Ultimately, however, the circumstances below do not suggest the occurrence of forfeiture but, instead, invited error.

¶ 29 "The rule of invited error or acquiescence is a procedural default sometimes described as estoppel." *In re Detention of Swope*, 213 Ill. 2d 210, 217, 821 N.E.2d 283, 287 (2004). "Under the doctrine of invited error, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error." *People v. Carter*, 208 Ill. 2d 309, 319, 802 N.E.2d 1185, 1190 (2003). "The rationale behind this well-established rule is that it would be manifestly unfair to allow a party a second trial upon the basis of error which that party injected into the proceedings." *Swope*, 213 Ill. 2d at 217.

¶ 30 In this case, when advocating for reconsideration of defendant's sentence at the May 2022 postplea hearing, Luchtenberg alluded to the July 2021 amendment to section 5-4.5-

95(b) and essentially asked the court to reconsider defendant's sentence in line with the spirit of the new version of the statute. However, counsel also explicitly argued that the amendment at issue was "not retroactive." Thus, the record reflects defendant's counsel effectively requested to proceed with reconsideration of defendant's sentence as if the amendments to section 5-4.5-95(b) were inapplicable to defendant. The State made the same argument, and the trial court indicated it understood and accepted the parties' representations. Under these circumstances, the doctrine of invited error, not forfeiture, precludes defendant's claim that he was entitled to retroactive application of the amended version of section 5-4.5-95(b).

¶ 31 As stated, defendant argues that this court may reach the merits of his "retroactivity argument" under either the plain-error doctrine or on the basis of ineffective assistance of counsel. We note, however, that the plain-error doctrine applies only in cases involving forfeiture. *People v. McGuire*, 2017 IL App (4th) 150695, ¶ 29, 92 N.E.3d 494. Where a defendant's counsel has specifically asked the trial court to proceed in a particular manner, "[t]he doctrine of invited error blocks [the] defendant from raising th[e] issue on appeal, absent ineffective assistance of counsel." *People v. Henderson*, 2016 IL App (1st) 142259, ¶ 210, 77 N.E.3d 1046; *People v. Patrick*, 233 Ill. 2d 62, 77, 908 N.E.2d 1, 10 (2009) (declining to address the defendant's plain-error claim because the defendant invited the error). Accordingly, in this instance, we consider only whether Luchtenberg provided ineffective assistance by failing to argue that defendant was entitled to elect sentencing under the more favorable, amended version of section 5-4.5-95(b) of the Code.

¶ 32 To establish an ineffective-assistance-of-counsel claim, a defendant must show both that (1) his counsel's performance fell below an objective standard of reasonableness and (2) he suffered prejudice "in that, absent counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different." *People v. Jackson*, 2020

IL 124112, ¶ 90, 162 N.E.3d 223 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). A defendant's failure to establish either deficient performance or prejudice is fatal to his claim. *Id.*

¶ 33 "When *** a claim of ineffective assistance of counsel was not raised in the trial court, our review is *de novo*." *People v. Bates*, 2018 IL App (4th) 160255, ¶ 46, 112 N.E.3d 657. Further, in this case, defendant's claim also presents an issue of statutory construction, *i.e.*, the retroactive application of a statutory amendment, that is similarly reviewed *de novo*. *People v. Hunter*, 2017 IL 121306, ¶ 15, 104 N.E.3d 358.

¶ 34 As defendant points out on appeal, our supreme court has held that a defendant has the right "to be sentenced under either the law in effect at the time the offense was committed or that in effect at the time of sentencing." *People v. Hollins*, 51 Ill. 2d 68, 71, 280 N.E.2d 710, 712 (1972). Absent "a showing that [the defendant] was advised of his right to elect ***, and an express waiver of that right, [he is] denied due process of law." *Id.*

¶ 35 Here, there is no dispute that under the law in effect both at the time of the offense and at the time of defendant's sentencing in November 2019, he was eligible for mandatory Class X sentencing pursuant to section 5-4.5-95(b) of the Code (730 ILCS 5/5-4.5-95(b) (West 2018)). Specifically, defendant pleaded guilty to a Class 2 felony offense and had at least two prior qualifying convictions for "Class 2 or greater Class felony" offenses. *Id.* There is also no dispute that after his sentencing but prior to the conclusion of postplea proceedings in May 2022, section 5-4.5-95(b) of the Code was amended in a way that made it inapplicable to defendant's case. See Pub. Act 101-652, § 10-281 (eff. July 1, 2021) (amending 730 ILCS 5/5-4.5-95(b)). Because the relevant statutory provision did not change prior to the time of defendant's sentencing, the proposition of law set forth in *Hollins* is not clearly or directly applicable to defendant. Nevertheless, defendant argues the amended version of section 5-4.5-95(b) should still be

retroactively applied to his case because the amendment went into effect while his case remained pending in the trial court. For the reasons that follow, we disagree.

¶ 36 When, as in this case, "the temporal reach of the statute is not clearly indicated in its text, then the statute's temporal reach is provided by default in section 4 of the Statute on Statutes." *Hunter*, 2017 IL 121306, ¶ 22; see 5 ILCS 70/4 (West 2020). That section states as follows:

> "No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act." 5 ILCS 70/4 (West 2020).

¶ 37 "[S]ection 4 is a general savings clause, which [the supreme court] has interpreted as meaning that procedural changes to statutes will be applied retroactively, while substantive changes are prospective only." (Internal quotation marks omitted.) *Hunter*, 2017 IL 121306, ¶ 22.

Further, under section 4, procedural law changes have been held to apply retroactively to cases that are "ongoing" or "pending ***, *i.e.*, a case in which the trial court proceedings had begun under the old statute but had not yet been concluded." *Id.* ¶ 30.

¶ 38 However, section 4 contains a specific provision that is applicable to new laws that mitigate a penalty or punishment: "If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect." 5 ILCS 70/4 (West 2020). "To 'mitigate' means 'to make less severe.' " *Hunter*, 2017 IL 121306, ¶ 56 (quoting Webster's Third New International Dictionary 1447 (1993)).

¶ 39 In *Hunter*, the supreme court determined that no matter whether statutory changes were "properly labeled 'procedural' or 'substantive,' " the above language from section 4 of the Statute on Statutes meant that if the changes mitigated a punishment, they could not be applied to defendants who were sentenced before the statute took effect. *Id.* ¶¶ 52-54. In so holding, it noted a prior decision, wherein it held "that the defendant was not entitled to be resentenced under the new criminal code, which went into effect just 13 days after he was sentenced, because, under section 4, 'a punishment mitigated by a new law is applicable only to judgments after the new law takes effect.' " *Id.* ¶ 54 (quoting *People v. Hansen*, 28 Ill. 2d 322, 340-41, 192 N.E.2d 359, 369 (1963)).

¶ 40 Defendant does not dispute that applying the July 2021 amendment to section 5-4.5-95(b) to his case would subject him to a less severe range of penalties. However, he attempts to distinguish *Hunter* on the basis that the amendments at issue in that case took effect while the defendants' cases were pending on appeal and not in the trial court. See *id.* ¶ 46. According to defendant, because the amendment to section 5-4.5-95(b) that is at issue in this case took effect

while his case was "ongoing" in the trial court, the sentencing amendments may be applied retroactively to him under section 4 of the Statute on Statutes. We note, however, that the court's rationale in *Hunter* was not based upon the fact that the defendants' cases were pending on appeal rather than in the trial court when the amendments took effect, but explicitly on the fact that the defendants "were sentenced well before" the sentence amendments took effect. *Id.* ¶ 55.

¶ 41 Defendant's position on appeal is also directly refuted by the supreme court's decision in *People v. Lisle*, 390 Ill. 327, 61 N.E.2d 381 (1945). There the court stated that section 4 of the Statute on Statutes "does not give the defendant the right to be sentenced under a law not in full force and effect at the time of his sentence." *Id.* at 328. The court held section 4 "could only apply to those classes of cases in which a new law had become effective prior to the date of the actual sentence." *Id.*

¶ 42 Defendant argues *Lisle* should not be held to control or inform the issue in this case because the supreme court's decision "does not specify whether that case was pending on appeal or in the trial court when the amendment became effective." He also argues that *Lisle* was decided before Rule 604(d) became effective and asserts as follows:

> "Based on Rule 604(d), a timely post[ ]plea motion is a prerequisite to an appeal from a guilty plea. Therefore, the order denying such a motion is the final judgment. [Citation.] As such, there is no final judgment that can be appealed prior to the denial of a post[ ]plea motion. Accordingly, it is at least a reasonable interpretation of [section 4 of the Statute on Statutes] that the judgment had not been 'pronounced' until the motion to reconsider sentence was denied."

¶ 43 We find *Lisle* is applicable to the present case and that defendant's arguments lack merit. Like *Hunter*, the court's decision in *Lisle* clearly states that section 4 of the Statute on

Statutes can "only apply to those classes of cases in which a new law had become effective prior to the date of the actual sentence." *Id.* Thus, the operative time for determining whether a new law that mitigates a punishment can apply retroactively is the date of sentencing. The supreme court did not limit or qualify its explicit holding in any way.

¶ 44 Further, supreme court case authority also refutes defendant's contention that there was no final judgment in his case until the denial of his postplea motion to reconsider. To support his contention, defendant cites *People v. Feldman*, 409 Ill. App. 3d 1124, 1127, 948 N.E.2d 1094, 1098 (2011), wherein the Fifth District held that for defendants who plead guilty, it is the order denying a postplea motion that is the final judgment in the case. Recently, however, in *People v. Walls*, 2022 IL 127965, ¶ 23, the supreme court overruled *Feldman* as to that proposition of law. The court reaffirmed its "long-standing case law holding that imposition of a sentence constitutes the final judgment in a criminal case" and stated that the holding in *Feldman* was "not supported by the plain language of [the court's] rules." *Id.* ¶¶ 23-24. Accordingly, the date of the final judgment in defendant's case was the date of his sentencing, not the date the trial court denied his postplea motion.

¶ 45 In his reply brief, defendant additionally cites to two recent appellate court decisions which have addressed the precise issue presented by this case but with conflicting results—the Second District's decision in *People v. Spears*, 2022 IL App (2d) 210583, and the Third District's decision in *People v. Foster*, 2022 IL App (3d) 210342-U. The factual circumstances in those cases are nearly identical to the factual circumstances of this case. In both, the defendants (1) pleaded guilty to either a Class 1 or Class 2 felony and were sentenced as Class X offenders under the version of section 5-4.5-95(b) in effect prior to July 2021; (2) filed postplea motions that were denied and, on appeal, had their cases remanded for compliance with Rule

604(d); and (3) had continued postplea proceedings on remand after the July 2021 amendment to section 5-4.5-95(b) took effect. *Spears*, 2022 IL App (2d) 210583, ¶¶ 3-15; *Foster*, 2022 IL App (3d) 210342-U, ¶¶ 4-7.

¶ 46 In *Spears*, the defendant argued on appeal that the trial court erred in denying his amended motion to reconsider his sentence because "he was entitled to elect the benefit of the amendment to section 5-4.5-95 of the Code that took effect after sentencing but before the trial court ruled on his amended motion to reconsider the sentence." *Spears*, 2022 IL App (2d) 210583, ¶ 19. The Second District agreed and remanded for a new sentencing hearing. *Id.* ¶ 29. In reaching its decision, the court noted the supreme court's statements in *Hunter* that, under section 4 of the Statute on Statutes, procedural law changes applied retroactively to ongoing or pending cases. *Id.* ¶ 23. It found that because the defendant's case was "pending" in the trial court when the July 2021 amendment to section 5-4.5-95(b) took effect, that amendment applied retroactively to defendant's case. *Id.* ¶ 27.

¶ 47 The *Spears* court determined that denying the defendant relief would lead to an "absurd result" because if he had been entitled to resentencing on any other ground "the amended version of section 5-4.5-95(b) of the Code would have applied at [the] defendant's new sentencing hearing." *Id.* ¶ 28. The court also relied on *Feldman*, in finding that rather than the trial court's imposition of the defendant's sentence, it was "the order denying [the defendant's] amended motion to reconsider the sentence that act[ed] as the final judgment in" his case. *Id.* ¶ 29.

¶ 48 Defendant urges this court to follow *Spears*. We note, however, that the *Spears* court did not address the supreme court's statements in either *Hunter* or *Lisle* that, under section 4 of the Statute on Statutes, a new sentencing law that mitigates punishment may only be applied in cases where the new law is effective before the date of the defendant's actual sentencing. *Hunter*,

2017 IL 121306, ¶ 52-54; *Lisle*, 390 Ill. at 328. Additionally, the Second District's analysis relied heavily on the proposition of law set forth in *Feldman* that the final judgment in the defendant's case was the denial of his motion to reconsider and not the imposition of sentence. As discussed, that proposition of law was explicitly overruled by the supreme court in *Walls*. Finally, in *Hunter*, despite finding mitigating sentencing amendments were inapplicable to the defendants because they became effective after the defendants were sentenced, the court contemplated that the new laws would have applied in the event that resentencing was warranted for some other reason. *Hunter*, 2017 IL 121306, ¶ 55 (noting the defendants made "no claim that error occurred in the trial court that would require vacatur of their sentences and remand for resentencing, thus giving them the option to be sentenced under" the new sentencing provisions). The supreme court noted no absurdity that would result from such an occurrence. Given these circumstances, we decline defendant's invitation to follow *Spears*.

¶ 49 Instead, we find the reasoning of *Foster* is more convincing. Although *Foster* is an unpublished decision, it may provide persuasive authority on review. See Ill. S. Ct. R. 23(e)(1) (eff. Jan. 1, 2021) (stating that a nonprecedential order entered under Rule 23(b) "may be cited for persuasive purposes"). In that case, the defendant argued on appeal that his postplea counsel was ineffective for failing to raise the issue of the July 2021 amendment to section 5-4.5-95(b) in connection with the defendant's motion to reconsider his sentence. *Foster*, 2022 IL App (3d) 210342-U, ¶ 10. The Third District determined the defendant's postplea counsel was not ineffective and that the "defendant was not entitled to have the new statute applied to his sentence through his motion to reconsider." *Id.* ¶¶ 13-14.

¶ 50 To support its holding, the Third District relied on the proposition of law set forth in both *Lisle* and *Hunter* that a new sentencing law can only apply when it takes effect prior to the

date of a defendant's sentence. *Id.* ¶ 14 (citing *Lisle*, 390 Ill. at 328, and *Hunter*, 2017 IL 121306, ¶ 54). Additionally, it noted that under section 4 of the Statute on Statutes, a new law that mitigates a sentence may only " 'be applied to any judgment *pronounced after the new law takes effect.*' " (Emphasis in original.) *Id.* ¶ 15 (quoting 5 ILCS 70/4 (West 2020)). It pointed out that in the case before it, the "judgment was pronounced" in July 2018, "when the [trial] court entered the [defendant's] sentence," and three years before the new sentencing law became effective. *Id.* ("The fact that [the] defendant could ask the court to reconsider his sentence does not change the fact that the judgment had been pronounced.").

¶ 51 In this case, like in *Foster*, defendant was sentenced well before the July 2021 amendment to section 5-4.5-95(b) became effective. Accordingly, he was not entitled to have the new version of the statute applied to his case. Because defendant's contention lacks merit, he cannot establish that Luchtenberg, his postplea counsel, was ineffective for failing to raise it in connection with his motion to reconsider his sentence.

¶ 52 B. Counsel's Compliance With Rule 604(d)

¶ 53 On appeal, defendant also argues that Luchtenberg failed to comply with the requirements of Rule 604(d). He asserts that although Luchtenberg filed a facially valid certificate, the record refutes its validity. In particular, defendant points out that during postplea proceedings, Luchtenberg (1) did not argue or support with an affidavit the one claim that was included in the amended postplea motion that he filed on defendant's behalf and (2) only argued an excessive sentence claim that was not included within the amended motion. He seeks remand for further postplea proceedings.

¶ 54 "Rule 604(d) governs the procedure to be followed when a defendant wishes to appeal from a judgment entered upon a guilty plea." *In re H.L.*, 2015 IL 118529, ¶ 7, 48 N.E.3d

1071. The rule requires that the defendant's postplea counsel file a certificate with the trial court that asserts the following:

> "1. I have consulted with the Defendant in person, by mail, by phone or by electronic means to ascertain the defendant's contentions of error in the entry of the plea of guilty and in the sentence;
>
> 2. I have examined the trial court file and report of proceedings of the plea of guilty and the report of proceedings in the sentencing hearing; and
>
> 3. I have made any amendments to the motion necessary for the adequate presentation of any defects in those proceedings." Ill. S. Ct. Rs. Art. VI Forms Appendix R. 604(d).

The purpose of the rule is to ensure that before the defendant appeals from his guilty plea, the trial judge who presided over the plea proceedings is " 'given the opportunity to hear the allegations of improprieties that took place outside the official proceedings and *dehors* the record, but nevertheless were unwittingly given sanction in the courtroom.' " *H.L.*, 2015 IL 118529, ¶ 9 (quoting *People v. Wilk*, 124 Ill. 2d 93, 104, 529 N.E.2d 218, 221-22 (1988)).

¶ 55 Postplea counsel must strictly comply with Rule 604(d)'s certification requirement. *Id.* ¶ 8. "Strict compliance requires counsel to prepare a certificate that meets the content requirements of the rule and to file the certificate with the trial court." *Id.* ¶ 25. The failure to strictly comply with Rule 604(d) "requires 'a remand to the circuit court for the filing of a new motion to withdraw guilty plea or to reconsider sentence and a new hearing on the motion.' " *People v. Gorss*, 2022 IL 126464, ¶ 19, 194 N.E.3d 490 (quoting *People v. Janes*, 158 Ill. 2d 27, 33, 630 N.E.2d 790, 792 (1994)). Additionally, even a facially valid certificate may be refuted by the record. *People v. Curtis*, 2021 IL App (4th) 190658, ¶¶ 36-37, 186 N.E.3d 467; see *People v.*

Winston, 2020 IL App (2d) 180289, ¶ 14, 155 N.E.3d 1125 ("[E]ven when the certificate is valid on its face, a remand will be necessary if the record refutes the certificate."). The question of whether counsel complied with Rule 604(d) is a legal question that is subject to *de novo* review. *Gorss*, 2022 IL 126464, ¶ 10,

¶ 56 Here, Luchtenberg filed a Rule 604(d) certificate that was facially compliant with the rule. Defendant argues, however, that the record refutes Luchtenberg's certification because it shows he did not make amendments to defendant's postplea motion that were necessary for the adequate presentation of defendant's claims. Ultimately, we find the record does not support defendant's claim of entitlement to further postplea proceedings.

¶ 57 As argued by the State, in *People v. Shirley*, 181 Ill. 2d 359, 369, 692 N.E.2d 1189, 1194 (1998), the supreme court rejected the "premise that the strict compliance standard *** must be applied so mechanically as to require Illinois courts to grant multiple remands and new hearings following the initial remand hearing." Instead, the court held that "[w]here *** the defendant was afforded a full and fair second opportunity to present a [postplea motion], [there is] limited value in requiring a repeat of the exercise, absent a good reason to do so." *Id.*

¶ 58 In this case, the record shows defendant was afforded a full and fair opportunity to present his postplea claims. First, nothing in the record casts doubt on Luchtenberg's certifications that he consulted with defendant and reviewed the trial court file and report of proceedings in connection with both defendant's guilty plea and his sentencing. In fact, at the postplea hearing on remand, defendant explicitly stated to the court that he had enough time to speak with Luchtenberg about postplea issues.

¶ 59 Second, although on remand Luchtenberg filed a motion to withdraw guilty plea on defendant's behalf, the record shows defendant elected not to pursue that claim. We note defendant

explicitly made the same decision during his initial postplea hearing, and nothing in the record suggests it was not his desire to forego such a claim on remand. Defendant also makes no argument on appeal that a meritorious claim for withdrawal of his guilty plea exists.

¶ 60 Third, the record supports a finding that defendant was able to pursue the reconsideration of his sentence fully and fairly on remand. Although Luchtenberg did not file a motion for reconsideration of defendant's sentence, he represented to the trial court that defendant wanted to seek reconsideration "going back to what [defendant] brought up at the past hearing." Luchtenberg stated he was stipulating to the arguments made at defendant's prior postplea hearing in which he presented an excessive sentence claim. He also presented additional argument to the court based on the amendment of section 5-4.5-95(b) of the Code. Defendant contends a full and fair hearing did not occur because Luchtenberg's actions resulted in no issues being preserved for appeal. However, because the excessive sentence claim was presented to and considered by the court, it was preserved for review and could have been raised by defendant on appeal. See *People v. Heider*, 231 Ill. 2d 1, 18, 896 N.E.2d 239, 249 (2008) ("[W]here the trial court clearly had an opportunity to review the same essential claim that was later raised on appeal, *** there was no forfeiture.").

¶ 61 Under the circumstances presented, the record reflects that defendant was afforded a full and fair second opportunity to present his motion for reconsideration of his sentence, the only motion he chose to pursue during the proceedings below. We find remand for further posptlea proceedings is unwarranted.

¶ 62 III. CONCLUSION

¶ 63 For the reasons stated, we affirm the trial court's judgment.

¶ 64 Affirmed.

People v. Brown, 2023 IL App (4th) 220400

Decision Under Review:	Appeal from the Circuit Court of Boone County, No. 17-CF-202; the Hon. Robert Tobin, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Thomas A. Lilien, and Christopher McCoy, of State Appellate Defender's Office, of Elgin, for appellant.
Attorneys for Appellee:	Tricia L. Smith, State's Attorney, of Belvidere (Patrick Delfino, David J. Robinson, and David E. Mannchen, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

2019 IL App (1st) 161646-U

SIXTH DIVISION
January 25, 2019

No. 1-16-1646

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the
	)	Circuit Court of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	12 CR 13240
	)	
DERRICK GRAY,	)	
	)	
	)	Honorable Thomas M. Davy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly denied defendant's motion to quash arrest and suppress evidence where police officers conducted a proper *Terry* stop; hearsay testimony that included a physical description of suspects did not amount to plain error; the State proved beyond a reasonable doubt that defendant possessed a firearm during the commission of the robbery; the case is remanded for resentencing under the amended firearm sentencing statute that made the enhancement discretionary for minors.

¶ 2 Following a bench trial, 17-year-old defendant, Derrick Gray, was convicted of armed robbery while armed with a firearm and sentenced to 23 years in prison. On appeal, defendant

argues that (1) the trial court erred by denying his motion to quash arrest and suppress evidence; (2) the trial court violated defendant's right to confront his accusers when it allowed officers to testify to inadmissible hearsay evidence; (3) the State failed to prove beyond a reasonable doubt that the item displayed during the events in question was a firearm; and (4) the trial court failed to advise defendant that he could be sentenced under section 5-4.5-105(b) of the Unified Code of Corrections (730 ILCS 5/5-4.5-105(b) (West 2016)). For the reasons that follow, we affirm the judgment of the trial court but remand for resentencing.

¶ 3 BACKGROUND

¶ 4 The State charged defendant and co-defendant, Marellis Fields, with the July 6, 2012, robbery with a firearm and unlawful restraint of the victim, Dion Baugh. Prior to trial, defendant filed a motion to quash arrest and suppress evidence, alleging officers illegally seized him. At the hearing, defendant testified that on July 6, 2012, at around 8:15 a.m., he and Fields were walking northbound from a restaurant at 69th and Halsted Street in Chicago. Defendant testified that he was wearing blue jeans and a white t-shirt. Fields had his hair in dreadlocks and was also wearing blue jeans and a white t-shirt.

¶ 5 Defendant testified that at 67th Street and Lowe, officers began chasing them, and they ran northbound toward 65th Street. Defendant testified that he ran from the officers because he "was scared." Defendant stated that an officer caught up to them and without showing an arrest warrant or search warrant, handcuffed defendant with his hands behind his back and put him in to the back of a marked squad car with the doors locked. An officer drove defendant to another location for a showup identification.

¶ 6 Detective William Levigne testified on behalf of the State that between 8:30 and 9 a.m. on July 6, 2012, he was driving eastbound on 67th Street in an unmarked police car when he

heard two calls over the police radio. One call was about a person with a gun and the other was about an armed robbery that had just occurred at 6935 South Union Street. Detective Levigne stated that the description he received of the individuals being sought in connection with these crimes was as follows: "One was a male black with a white T-shirt and blue jeans with twists in his hair. The second individual [was] a taller male black short hair."

¶ 7 Detective Levigne testified that he received information over the radio about other officers that were chasing the suspects on foot. Based on that information, he parked his car at 66th Street and Lowe in an attempt to catch the suspects. He testified that he "saw two individuals matching the description of wanted individuals for the armed robbery. They were on foot. They were running. They were running northbound on Lowe." Detective Levigne stated that he did not see any officers behind the two individuals. Detective Levigne testified that he pursued the two individuals and detained defendant at 6531 South Lowe Avenue as defendant tried to enter an apartment building. Detective Levigne stated that he handcuffed defendant and that other officers detained codefendant Fields.

¶ 8 Detective Levigne testified that defendant was not free to go and stated that the officers had no warrants for him. Another officer drove defendant to 6642 South Lowe, a block away, for a showup identification with the victim of the armed robbery.

¶ 9 The trial court denied defendant's motion to quash arrest and suppress evidence, finding that defendant and Fields were a short distance away from the alleged crime scene, were running, and they matched the radio descriptions. The court stated:

> "So I believe that on the state of the law at this point that it would be based on the totality of the circumstances a justifiable *Terry* stop. The defendant could be handcuffed for officer's safety, especially when the incident that was described

was an armed robbery. That the detention was going to be for a brief period of time to determine if an identification [could] be made."

¶ 10 Defendant filed a motion to reconsider, which was denied, and the case proceeded to trial.

¶ 11 At a bench trial, the victim, Dion Baugh, testified that he had a 2004 federal conviction for gun possession and providing false statements for which he was sentenced to 63 months in prison. He also testified that he had a felony theft conviction from McHenry County that occurred 18 months before trial.

¶ 12 Baugh testified that on July 6, 2012, at approximately 6 to 7:30 a.m., he was mowing a friend's lawn at 6935 South Union Street, when two individuals jumped over a waist-high fence. One of the men, whom Baugh identified as defendant, pointed a gun in his face and told him to "[g]et down." Baugh had never seen defendant before. He testified that defendant was "100%" the man who pointed the gun at him.

¶ 13 Baugh testified that defendant put the gun to the right side of Baugh's face and attempted to make him lay down on his stomach. Baugh testified that the gun was "black, it was a 9 millimeter." Baugh testified that the second person who jumped over the fence also had a gun that he pointed at Baugh. He had dreadlocks, while defendant was tall, thin, with short hair, and wearing a white t-shirt. Baugh testified that there was a third individual who did not jump over the fence but stood in the alley behind the house. Baugh testified that defendant told Fields to search Baugh, and that Fields took Baugh's keys and wallet, which contained $600.

¶ 14 Baugh testified that the two individuals then jumped back over the fence. Baugh ran to the front of the house to knock on the door, but at the same time Baugh heard police sirens. Baugh testified that officers arrived and he spoke to them. A short time later, Baugh was driven a

few blocks away to a location where he identified defendant as one of the individuals who robbed him. Baugh testified that officers later helped him locate his keys and wallet in an empty lot that was one block east of 6935 South Union Street. The wallet did not contain any money.

¶ 15 Officer Leon Solana testified that he was working alone on July 6, 2012, at around 8 a.m. when he heard a radio call of an armed robbery occurring near 6742 South Lowe Avenue, where Officer Solana was located. Officer Solana testified that he heard a description of the two individuals over the radio, and then saw "two males matching the description given over the radio." When asked what the description was, Officer Solana stated, "Um, two male blacks, one was taller, one was shorter. Shorter one had curls in his hair. And both wearing white T-shirts." Officer Solana testified that he did not see either person with a firearm. The individuals ran northwest. Officer Solana tried to chase them but lost sight of them. Later, he saw defendant when another officer had him in custody. Officer Solana testified that there were 15 to 20 officers involved in the pursuit of the suspects.

¶ 16 Detective Levigne testified that at around 8:35 to 8:40 a.m. on the date in question, he heard two radio calls. He stated, "The first call was a person with a gun. The second call was an armed robbery that just occurred." When asked what description was given over the radio, Detective Levigne stated, "Two male blacks, one was with a white T-shirt and twists or dreadlocks in his hair, and the other individual was a taller male, black, dressed in blue jeans." Detective Levigne testified that he parked his car in anticipation of the individuals running by him. About 10 to 15 minutes later, he saw two individuals matching the description that had been given over the radio. They were both running, so Detective Levigne exited his vehicle and pursued them on foot. He did not see any other officers pursuing them. He identified defendant as one of the two individuals he saw running.

¶ 17 The prosecutor then asked Detective Levigne, "What description did the defendant match that you heard?" Detective Levigne answered, "Male black, I believe he had a white T-shirt. One of the individuals had a white T-shirt and one was taller than the other and had shorter hair." Detective Levigne testified that he detained defendant at 6531 South Lowe Avenue by placing him in handcuffs, and that he was then assisted by other officers. Detective Levigne testified that no firearm was recovered.

¶ 18 The trial court found defendant guilty on all counts. In finding defendant guilty, the trial court noted that "Mr. Baugh's testimony in and of itself *** might not be enough, but there was that corroborating testimony of Mr. Baugh's testimony." The trial court further stated, "Officer Solana testified that he responded to an armed robbery that had just occurred, called out a description, and saw two male blacks matching the description, one taller, the other shorter." The trial court also stated that Detective Levigne had testified that "[t]he individuals were at 67th and Union, described as two male blacks, one with a white T with a twist and dreads in his hair. The second taller and wearing blue jeans."

¶ 19 Defendant filed a motion for a new trial, arguing that Baugh was not a credible witness and that there was lack of proof as to the firearm element of the offense. The trial court denied the motion and on November 13, 2015, sentenced defendant to 23 years in prison, which included a mandatory 15-year firearm enhancement.

¶ 20 On December 11, 2015, defendant filed a motion to reconsider his sentence along with a motion to reconsider ruling on defendant's motion for a new trial. The court held a hearing on both motions. On December 16, 2015, the court found that in reviewing the totality of the circumstances, including some inconsistencies in Baugh's testimony, the State proved the charge of armed robbery while armed with a firearm beyond a reasonable doubt. The trial court stated

that when it imposed "the 23-year sentence, that it was only two years extra because I had considered [defendant's] lack of background and potential for rehabilitation." The court then continued the case until January 8, 2016, for the parties to calculate sentencing credit. The State asked if the defense would be filing any more motions and the defense counsel stated that it would not. The trial court then stated, "Well, [the] Supreme Court may, between now and then, surprise everyone and say, Hey, we were wrong back 10 or 15 years ago, and the 15-year wouldn't apply, then certainly."

¶ 21 On December 17, 2015, codefendant Fields pleaded guilty to armed robbery with a dangerous weapon and received 10 years in prison. On January 8, 2016, defendant filed a motion to reconsider the application of the firearm enhancement based on his codefendant's guilty plea and a motion to reconsider his sentence as disparate from his codefendant's sentence. The court continued the case to February 10, 2016, for argument on both motions.

¶ 22 On February 10, 2016, the trial court denied both motions. The court granted a stay of the mittimus to February 19, 2016, so defendant could transfer his belongings to family members. On February 19, 2016, an order of commitment and sentence was entered stating that defendant was sentenced to 23 years in prison with credit for 1324 days of presentence custody. This appeal followed.

¶ 23 ANALYSIS

¶ 24 On appeal, defendant contends that (1) the trial court erred in denying his motion to quash arrest and suppress evidence; (2) the trial court violated defendant's right to confront his accusers when it allowed officers to testify to inadmissible hearsay evidence; (3) the State failed to prove beyond a reasonable doubt that the item displayed during the events in question was a

firearm; and (4) the trial court failed to advise defendant that he could be sentenced under section 5-4.5-105(b) of the Unified Code of Corrections (730 ILCS 5/5-4.5-105(b) (West 2016)).

¶ 25 Motion to Quash Arrest and Suppress Evidence

¶ 26 Defendant's first argument on appeal is that the trial court erred in denying defendant's motion to quash arrest and suppress evidence. Defendant contends that the police lacked probable cause to believe that defendant committed a crime before arresting him. The State responds that the police officers properly performed a *Terry* stop and their temporary restraint of defendant did not amount to an arrest.

¶ 27 When reviewing a trial court's decision regarding a motion to quash arrest and suppress evidence, we must accord great deference to the trial court's factual findings and credibility assessments and will reverse those findings only if they are against the manifest weight of the evidence. *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001). However, we review *de novo* the ultimate finding with respect to probable cause or reasonable suspicion. *Id.*

¶ 28 In appropriate circumstances, a police officer may approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. *Terry v. Ohio*, 392 U.S. 1, 22 (1968); see also 725 ILCS 5/107-14 (West 2014) (codifying *Terry* stops). A police officer may stop a person for temporary questioning if the officer has knowledge of "sufficient articulable facts at the time of the encounter to create a reasonable suspicion that the person in question has committed or is about to commit a crime." *People v. Lee*, 214 Ill. 2d 476, 487 (2005). The reasonableness of an investigatory stop may be determined by examining whether the police officers were aware of specific facts giving rise to reasonable suspicion and whether the police intrusion was reasonably related to the known facts. *People v. Starks*, 190 Ill. App. 3d 503, 506 (1989). The officer's suspicion must amount to more than an

inarticulate hunch, but need not rise to the level of suspicion required for probable cause. *People v. Close*, 238 Ill. 2d 497, 505 (2010). "A general description of a suspect coupled with other specific circumstances that would lead a reasonably prudent person to believe the action taken was appropriate can constitute sufficient cause to stop or arrest." *People v. Ross*, 317 Ill. App. 3d 26, 29-30 (2000) (citing *People v. Robinson*, 299 Ill. App. 3d 426, 431 (1998)).

¶ 29 The evidence here established that on the morning in question, Detective Levigne received a call over the radio that an armed robbery had just occurred, and a description of the suspects was given. Detective Levigne parked at 66th and Lowe to see if the suspects would appear. "Ten or fifteen minutes later," two individuals that matched the description of the offenders emerged from the back of a residence and ran north on Lowe. Detective Levigne exited his vehicle and gave chase. He testified that the alleged offenders looked in his direction and continued to run. Detective Levigne caught defendant at 6531 South Lowe and handcuffed him. Defendant was transported one block, where he was identified in a showup by the victim. The armed robbery had occurred at 6935 South Union, approximately three blocks from where defendant was apprehended. These facts provide at least the minimal articulable suspicion required to stop defendant. *People v. Booker*, 2015 IL App (1st) 131872 (investigatory stop was proper where officers received call of a man with a gun, and observed a man matching description three blocks from the scene of crime approximately 10 to 15 minutes after the offense had occurred); *People v. Walters*, 256 Ill. App. 3d 231, 236 (1994) (reasonable suspicion can be derived from seeing suspect similar to one believed to be fleeing from a recent crime in the general area where fleeing suspect would be expected to be found, given the time and distance from the crime scene). Therefore, we conclude that the investigatory stop was proper.

¶ 30 Next, we must consider whether the investigatory stop of defendant constituted or was converted into an arrest before the victim identified defendant. Defendant asserts that the police effected an arrest by handcuffing him, placing him in a squad car, and transporting him to the victim for identification. "An investigatory stop is distinguished from an arrest based on the length of detention and the scope of investigation following the initial stop, not the initial restraint of movement." *Ross*, 317 Ill. App. 3d at 30. The State bears the burden of showing that a seizure based on reasonable suspicion was sufficiently limited in scope and duration. *People v. Brownlee*, 186 Ill. 2d 501, 519 (1999).

¶ 31 In the case at bar, neither the length of detention nor the scope of investigation transformed the lawful investigatory stop into an arrest. Defendant was transported only one block from where the police effectuated defendant's stop to where the victim identified him in a showup. Thus, the length of defendant's detention was very brief. See *Ross*, 317 Ill. App. 3d at 30-31 (detention was very brief where police officers transported defendant only one block for a showup).

¶ 32 The scope of the *Terry* stop conformed to appropriate procedures because it was brief and determinative in nature. The purpose of a *Terry* stop is to allow police officers to investigate the circumstances that provoke suspicion and either confirm or dispel suspicions. *People v. Fasse*, 174 Ill. App. 3d 457, 460-61 (1988). The scope of investigation must be reasonably related to the circumstances that justified the police interference and the investigation must last no longer than necessary to effectuate the purpose of the stop. *Brownlee*, 186 Ill. 2d at 519. Here, a brief stop with a quick determination as to defendant's involvement with the crime comports with the permissible scope of an investigation after a *Terry* stop. See *Ross*, 317 Ill. App. 3d at 31 (eight-minute stop with quick determination of person's involvement in crime falls within permissible

scope of an investigation after a *Terry* stop). We note that transporting a suspect for the purpose of an identification is not necessarily an unreasonable seizure under the fourth amendment. *People v. Lippert*, 89 Ill. 2d 171, 181-82 (1982). While an unreasonable seizure may be found where the person is transported to an institution-like setting like a police station or interrogation room, "the transportation of a suspect for purposes of a showup when the officer is conducting a field investigation immediately after the commission of a crime and when the victim, a short distance away, could confirm or deny the identification of the suspect may not be an unreasonable seizure under the fourth amendment." *People v. Follins*, 196 Ill. App. 3d 680, 693 (1990).

¶ 33 Here, the restraint of defendant did not transform the investigatory stop into an arrest. "[T]he status or nature of an investigatory stop is not affected by either the drawing of a gun by the police officer [citation] or by the use of handcuffs [citation] or by placing the person in a squad car [citation]." *Ross*, 317 Ill. App. 3d at 32. Here, the police officer knew that the offender he was seeking had committed an armed robbery, and thus likely had a weapon on his person. A reasonably prudent person in these circumstances would be warranted in the belief that his safety or that of others was in danger, and we will not second-guess the police officer's decisions here. See *People v. Smith*, 208 Ill. App. 3d 44, 50 (1991). Under the facts and circumstances in the present case, we find that the investigatory stop was properly based upon reasonable suspicion and did not give rise to an arrest until after the victim's positive identification.

¶ 34 Hearsay Evidence

¶ 35 Defendant's next argument on appeal is that the trial court violated his right to confront his accusers where it allowed the State to elicit from multiple officers the hearsay contents of a radio call that provided a description of the alleged offenders, and where the trial court relied

upon those hearsay comments to find defendant guilty. Defendant admits that he did not properly preserve this alleged error for review since he did not object to it at trial and did not include it in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (objection both at trial and in posttrial motion required to preserve an issue for appeal). Defendant contends that the issue should nevertheless be reviewed under the plain error doctrine. The plain error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatowski*, 225 Ill. 2d 551, 565 (2007). In a plain error analysis, it is the defendant who bears the burden of persuasion. *People v. Sebby*, 2017 IL 119445, ¶¶ 51-52. However, "[t]he initial analytical step under either prong of the plain error doctrine is [to] determine whether there was a clear or obvious error at trial." *Id.* ¶ 49.

¶ 36 Defendant contends that the allegedly improper hearsay statements came from Detective Levigne and Officer Solana. Defendant notes that during the officers' respective testimony, they repeated the contents of the radio calls they heard. Detective Levigne testified that the suspects were described as "[t]wo male blacks, one with a white t-shirt and twists or dreadlocks in his hair, and the other individual was a taller male, black, dressed in blue jeans." Officer Solana testified that he heard a description of the officers as "two male blacks, one was taller, one was shorter. Shorter one had curls in his hair. And both wearing white T-shirts." Defendant argues that these statements were improper hearsay statements.

¶ 37 Where testimony of an out-of-court statement is offered, not for the truth of the matter asserted, but for the limited purpose of explaining the reason the police conducted their investigation as they did, the testimony is not objectionable on the grounds of hearsay. *People v. Rodriguez*, 312 Ill. App. 3d 920, 929 (2000). " 'In criminal cases, an arresting or investigating officer should not be put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct.' " *People v. Cameron*, 189 Ill. App. 3d 998, 1004 (1989) (quoting E. Cleary, McCormick on Evidence § 249, at 734 (3d ed. 1984)). However, the testimony of the officers regarding the words of the radio communication must not be used for their truth by the prosecution, but only used to show that the words were spoken when the fact that they were spoken satisfies a relevant nonhearsay purpose. *People v Simms*, 143 Ill. 2d 154, 174 (1991).

¶ 38 In the instant case, the substance of the radio call was testified to repeatedly by Detective Levigne and Officer Solana. The substance of the radio call was also referred to by the trial court when it stated, "Mr. Baugh's testimony in and of itself *** might not be enough, but there was that corroborating testimony of Mr. Baugh's testimony." The trial court further stated, "Officer Solana testified that he responded to an armed robbery that had just occurred, called out a description, and saw two male blacks matching the description, one taller, the other shorter." The trial court also stated that Detective Levigne had testified that "[t]he individuals were at 67th and Union, described as two male blacks, one with a white T with a twist and dreads in his hair. The second taller and wearing blue jeans."

¶ 39 When the content of the out-of-court statement goes to "the very essence of the dispute," the balance tips against admissibility. *People v. Warlick*, 302 Ill. App. 2d 595, 600 (1998). Here, the contents of the radio call included a description of the offense, armed robbery, as well as a

description of defendant. These words go to the essence of the dispute: "whether the defendant was the man who committed the crime." *People v. Rivera*, 277 Ill. App. 3d 811, 818 (1996). We find that admission of the contents of the radio call was an error, but that defense counsel did not call this error to the trial court's attention. Given the strength of the properly admitted evidence against defendant, we do not believe the hearsay identification rose to the level of plain error under the circumstances of this case. See *People v. Rice*, 321 Ill. App. 3d 475, 484 (2001). We do not find the evidence to be closely balanced. Baugh specifically testified two individuals jumped over the fence while he was mowing the lawn. He identified defendant in court as one of the individuals. Baugh testified that defendant put the gun to the side of his face and made him lay down on his stomach while codefendant Fields took his wallet. Baugh testified that codefendant had dreadlocks while defendant was tall, thin, with short hair, and wearing a white t-shirt. The police officers testified that they received a call over the radio that prompted Officer Solana to give chase to two individuals matching the description given over the radio. The radio call also prompted Detective Levigne to park his car and wait for the suspects. He saw two suspects matching the description given over the radio and gave chase. He eventually caught defendant and handcuffed him. Shortly thereafter, defendant was identified by Baugh. We also do not believe that this hearsay error was so fundamental as to deny defendant a fair trial. *Id.* Accordingly, we find that while it was error to allow the officers to testify to the contents of the radio call, the admission of inadmissible hearsay evidence did not amount to plain error.

¶ 40 Sufficiency of Evidence

¶ 41 We next address defendant's argument that the State failed to prove beyond a reasonable doubt that the item displayed during the events in question was a firearm. The State responds that it proved beyond a reasonable doubt that defendant possessed a firearm during the commission

of the charged crime where the victim testified that defendant held a black nine-millimeter gun to his head and robbed him. The relevant question on a challenge to the sufficiency of the evidence is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. *People v. Pollock*, 202 Ill. 2d 189, 217 (2002). If we find that the evidence meets this standard, we must affirm the conviction (*People v. Herrett*, 137 Ill. 2d 195, 203 (1990)); we will not retry the defendant (*People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011)). A trier of fact's findings are accorded great weight because the trier of fact observed and heard the witnesses firsthand and therefore is "best equipped to determine the witnesses' credibility, weigh their testimony, draw reasonable inferences from the evidence, and ultimately choose among conflicting accounts of events." *People v. Henderson*, 2016 IL App (1st) 142259, ¶ 166.

¶ 42 Defendant was charged with armed robbery in that while committing robbery, he carried or was otherwise armed with a firearm, as defined by the Firearm Owners Identification (FOID) Card Act. 720 ILCS 5/2-7.5 (West 2012). The FOID Card Act defines a "firearm" as "any device by whatever name known, which is designed to expel a projective or projectiles by the action of an explosion, expansion of gas or escape of gas." 430 ILCS 65/1.1 (West 2010).

¶ 43 In the case at bar, the victim testified that defendant pointed a gun at his head during the commission of the robbery. The victim testified that defendant's gun was a black nine-millimeter gun. Although the gun was never recovered, the victim's testimony alone was sufficient to prove beyond a reasonable doubt that defendant was in possession of a firearm during the commission of the robbery. In fact, our supreme court has recently reiterated that the testimony of a single eyewitness that a gun or pistol was used in a robbery is sufficient to permit a trier of fact to conclude that a firearm was used in the offense despite the lack of a recovered weapon. See

People v. Wright, 2017 IL 119561, ¶ 76; *People v. Davis*, 2015 IL App (1st) 121867, ¶ 12 ("eyewitness testimony that the offender was armed with a gun, combined with circumstances under which the witness was able to see the weapon, is sufficient to allow a reasonable inference that the weapon was a real gun."); *People v. Fields*, 2014 IL App (1st) 110311, ¶ 36 ("unequivocal testimony of a witness that the defendant held a gun is circumstantial evidence sufficient to establish that a defendant is armed during a robbery.") Accordingly, we find that the State proved beyond a reasonable doubt that defendant possessed a firearm during the commission of the robbery.

¶ 44 Sentence

¶ 45 As a final matter, we address defendant's contention that the trial court failed to advise defendant that he could be sentenced under section 5-4.5-105(b) of the Unified Code of Corrections (Code) (730 ILCS 5/5-4.5-105(b) (West 2016)), which made discretionary the mandatory 15-year sentence enhancement that was applied to defendant's sentence. Pursuant to Public Act 99-69 (eff. Jan. 1, 2016), and Public Act 99-258 (eff. Jan. 1, 2016), our legislature has provided that "[o]n or after the effective date of this amendatory Act of the 99th General Assembly, when a person commits an offense and the person is under 18 years of age at the time of the commission of the offense, the court must consider specific sentencing factors applicable to juveniles." 730 ILCS 5/5-4.5-105(b) (West 2016). As of January 1, 2016, trial courts have discretion to decline to impose firearm enhancements, such as the one applied to defendant's sentence, for persons under 18 years of age at the time of the commission of the offense. *Id.* The State maintains, however, that the trial court properly imposed the mandatory 15-year sentence enhancement where defendant was sentenced on November 13, 2015, more than six weeks before the firearm enhancement amendment came into effect on January 1, 2016.

¶ 46 Whether the statutory amendment at issue here applies to defendant's case presents an issue of statutory construction that we review *de novo*. *People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 27. As defendant notes, the Illinois Supreme Court has recently affirmed that section 4 of the Statute on Statutes (5 ILCS 70/4 (West 2016)), defines the temporal reach of section 5-4.5-105(b). *People v. Hunter*, 2017 IL 121306, ¶¶ 52-54. Section 4 states in pertinent part:

> "No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the *proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding*. If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be *applied to any judgment pronounced after the new law takes effect*." (Emphasis added.) 5 ILCS 70/4 (West 2016).

¶ 47 "Judgment" means an "adjudication by the court that defendant is guilty or not guilty, and if the adjudication is that the defendant is guilty, it includes the sentence pronounced by the court." 730 ILCS 5/5-1-12 (West 2016). The State contends that because judgment was entered on November 13, 2015, when the trial court pronounced defendant's sentence, the amended sentencing statute does not apply.

¶ 48 Here, on December 11, 2015, defendant filed a motion to reconsider his sentence, along with a motion for leave to file a motion to reconsider the ruling on his motion for a new trial. The court granted defendant leave to file the motion to reconsider the ruling on defendant's motion for a new trial, and held a hearing on both motions on December 16, 2015. At that hearing, the court stated that when it imposed "the 23-year sentence, *** I had considered [defendant's] lack of background and potential for rehabilitation." The court then continued the case until January 8, 2016, for the parties to calculate sentencing credit. When defense counsel indicated that it would not be filing any more motions before then, the trial court stated that our supreme court could, between now and then, "say, Hey, we were wrong back 10 or 15 years ago, and the 15-year wouldn't apply, then certainly."

¶ 49 On January 8, 2016, defendant filed a motion to reconsider the application of the firearm enhancement based on his codefendant's guilty plea and a motion to reconsider his sentence as disparate from his codefendant's sentence. The court continued the case to February 10, 2016, for argument on both motions. On February 10, 2016, after a hearing, the trial court denied both motions.

¶ 50 It is of note to us that if the trial court had granted defendant's motion to reconsider sentence that was filed on December 11, 2015, the new sentencing hearing may have taken place after January 1, 2016, at which point the new sentencing hearing would have to "conform, so far as practicable, to the laws in force at the time of such proceeding," which would include the new firearm enhancement amendment. 5 ILCS 70/4 (West 2016). Additionally, motion to reconsider sentence that was filed on January 8, 2016, had been granted, or at least included this issue of the new sentencing enhancement statute, the new sentencing amendment would have applied at the new sentencing hearing. In this narrow set of circumstances, where judgment had been entered,

but proceedings were still ongoing at the time the amendment took effect, we find that the amendment should have been applied to defendant's sentence.

¶ 51 We find support for this conclusion in our supreme court's recent rulings. Our supreme court, in *People ex rel. Alvarez v. Howard*, 2016 IL 120729, ¶ 28 (quoting *People v. Zibrio*, 242 Ill. 2d 34, 46 (2011)), stated that "[u]nder section 4, substantive amendments may not be applied retroactively, but 'procedural law changes will apply to ongoing proceedings.' " It has also stated that application of the Statute on Statute's default rule means that the amended statute "would apply retroactively to a pending case, *i.e.*, a case in which the trial court proceedings had begun on the old statute but had not yet been concluded." *Hunter*, 2017 IL 121306, ¶ 30. We have an obligation to construe statutes in a manner that will avoid absurd, unreasonable, or unjust results that the legislature could not have intended. *People ex rel. Alvarez v. Gaughan*, 2016 IL 120110, ¶ 19. As our supreme court has recently observed, "the process of statutory construction should not be divorced from consideration of real-world results." *People v. Fort*, 2017 IL 118966, ¶ 35. Here, the State's interpretation of the statute would lead to an absurd result – one in which if the trial court had granted either of defendant's motions to reconsider his sentence, the amended statute would apply at the new sentencing hearing, but where if the motions to reconsider were denied, the statute would not apply.

¶ 52 We find that under the narrow circumstances of this case, where the judgment occurred on November 13, 2015, but where the case was still pending before the trial court until February 19, 2016, the amended statute should have applied. If defense counsel had presented a motion to reconsider defendant's sentence based on this new amendment, or if the trial court had granted either of defendant's motions to reconsider sentence, the amended sentencing scheme would have applied at defendant's new sentencing hearing. See *People v. Bryant*, 369 Ill. App. 3d 54,

61 (2006) (stating that the purpose of a motion to reconsider "is to bring to the trial court's attention changes in the law, errors in the court's previous application of existing law, and newly discovered evidence ***.") "A court in a criminal case has inherent power to reconsider and correct its own rulings, even in the absence of a statute or rule granting it such authority." *People v. Mink*, 141 Ill. 2d 163, 171 (1990). As our supreme court has stated, "[s]o long as the case was pending before it, the trial court had jurisdiction to reconsider any order which had previously been entered." *Id.* Here, the case was certainly still pending before the trial court when the amended law took effect on January 1, 2016, and the trial court could have reconsidered its sentence in light of the amendment. See *Hunter*, 2017 IL 121306, ¶ 30 (application of the Statute on Statute's default rule meant that the amended statute "would apply retroactively to a pending case, *i.e.*, a case in which the trial court proceedings had begun on the old statute but had not yet been concluded.") Accordingly, we remand this matter to the trial court with directions that a new sentencing hearing be held in accordance with the sentencing scheme found in section 5-4.5-105(b) of the Code (730 ILCS 5/5-4.5-105(b) (West 2016)). See *People v. Reyes*, 2016 IL 119271, ¶ 12 (defendant entitled on remand to be resentenced under sentencing scheme found in section 5-4.5-105).

¶ 53 CONCLUSION

¶ 54 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County, but remand for resentencing under the new sentencing provisions discussed in this order.

¶ 55 Affirmed; remanded for resentencing.

2022 IL App (3d) 210342-U

Order filed November 15, 2022

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2022

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-21-0342
v.	)	Circuit No. 17-CF-494
	)	
PATRICK G. FOSTER,	)	Honorable Cynthia M. Raccuglia,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HAUPTMAN delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant did not receive ineffective assistance of counsel. The court erred by sentencing defendant to an extended-term sentence on a Class 3 felony.

¶ 2 Defendant, Patrick G. Foster, appeals his sentences. Defendant argues that counsel was ineffective for not asking the La Salle County circuit court to reconsider his sentence based upon recent changes to the sentencing statutes. He further argues that the court erred by sentencing him to an extended-term sentence on his Class 3 felony conviction when it is a less serious offense than his Class 2 felony conviction. We affirm as modified.

¶ 3 I. BACKGROUND

¶ 4 On May 15, 2018, defendant pled guilty to: (1) unlawful failure to register as a sex offender, a Class 2 felony (730 ILCS 150/6, 10(a) (West 2016)) for failing to report within three days of changing his address, having previously been convicted of a violation of the Sex Offender Registration Act, and (2) unlawful failure to register as a sex offender, a Class 3 felony (*id.*) for knowingly providing false material information by telling an officer his address had not changed. The plea did not include an agreement as to sentencing. In accepting the plea, the court noted that the Class 2 felony would be sentenced as a Class X felony due to defendant's criminal history such that defendant faced 6 to 30 years' imprisonment. It further noted that the sentencing range for the Class 3 felony was 2 to 5 years' imprisonment but if defendant was extended-term eligible, he faced 2 to 10 years' imprisonment.

¶ 5 The matter proceeded to a sentencing hearing on July 12, 2018. After hearing the parties' arguments, the court, in rendering its decision, stated that defendant's "attitude is the most serious aggravating factor in this case requiring that [he] go to prison longer than thirteen years because thirteen years hasn't made a difference." The court sentenced defendant to 14½ years' imprisonment for the Class 2 felony and 10 years' imprisonment for the Class 3 felony, to be served concurrently.

¶ 6 On July 27, 2018, defense counsel filed a motion to reconsider sentence arguing the court placed too much emphasis on defendant's criminal history and erred by failing to place more emphasis on the facts that defendant pled guilty, and the crimes were nonviolent. On September 6, 2018, the court held a hearing on the motion to reconsider sentence which it denied. Defendant appealed. On March 25, 2020, this court entered an order remanding the matter for a *de novo*

hearing on the postplea motion, including strict compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2017). *People v. Foster*, No. 3-18-0537 (2020) (unpublished minute order).

¶ 7 Following this court's remand, the circuit court held various status hearings and defendant was ultimately represented by different counsel. New counsel filed a motion to reconsider sentence and a compliant Rule 604(d) certificate on July 8, 2021. The motion again argued that the court placed too much emphasis on defendant's criminal history and erred by failing to place more emphasis on the facts that defendant pled guilty, and the crimes were nonviolent. The court heard and denied the motion on July 8, 2021. Defendant appeals.

¶ 8 II. ANALYSIS

¶ 9 A. Ineffective Assistance of Counsel

¶ 10 Defendant argues that his new posttrial counsel provided ineffective assistance by failing to argue in the motion to reconsider that there was a change in the sentencing statutes that became effective on July 1, 2021 (see Pub. Act 101-652, § 10-281 (eff. July 1, 2021) (amending 730 ILCS 5/5-4.5-95(b))). Under the changed statute defendant would not have been eligible for Class X sentencing, rather he would have been subject to the regular extended term of 7 to 14 years' imprisonment. He argues that counsel's performance was deficient because part of the purpose of a motion to reconsider sentence is to bring changes in the law to the court's attention and counsel failed to do so. Defendant argues he was prejudiced because although the statute was not retroactive and did not outright apply to him, it would show that the legislature had changed their view on the seriousness of the offense and that the court could have effectuated the spirit of the law and given him a lower sentence within the Class X range. After briefing was completed, this court allowed defendant's motion to cite additional authority—*People v. Spears*, 2022 IL App (2d) 210583—which defendant argues supports his position. *Spears* held, in similar

circumstances, that the circuit court, in deciding the defendant's motion to reconsider sentence should have considered the change in the sentencing statute because it applied to the defendant's case as the case was still pending due to the motion to reconsider. See *id.* ¶ 29.

¶ 11 "To establish a claim of ineffective assistance of counsel, a defendant must prove both deficient performance and prejudice." *People v. Smith*, 195 Ill. 2d 179, 187-88 (2000). "Counsel's performance is measured by an objective standard of competence under prevailing professional norms." *Id.* at 188. "[T]he effectiveness of *** counsel must be assessed against an objective standard of reasonableness from the perspective of the time of the alleged error and without hindsight." *People v. Reed*, 2014 IL App (1st) 122610, ¶ 66. To establish prejudice, a defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" or " 'that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair.' " *People v. Manning*, 241 Ill. 2d 319, 326-27 (2011) (quoting *People v. Jackson*, 205 Ill. 2d 247, 259 (2001)).

¶ 12 "When ruling on a motion to reconsider a sentence, the trial court should limit itself to determining whether the initial sentence was correct; it should not be placed in the position of essentially conducting a completely new sentencing hearing based on evidence that did not exist when defendant was originally sentenced." *People v. Vernon*, 285 Ill. App. 3d 302, 304 (1996). "The purpose of a motion to reconsider sentence is not to conduct a new sentencing hearing, but rather to bring to the circuit court's attention changes in the law, errors in the court's previous application of existing law, and newly discovered evidence that was not available at the time of the hearing." *People v. Burnett*, 237 Ill. 2d 381, 387 (2010).

¶ 13 Here, appellate counsel admitted in briefing that the change in statute did not apply to defendant, stating "Despite the change in the statute, [defendant] was still required to be sentenced as a Class X offender because he pleaded guilty and was sentenced when the previous statute was still in effect." This is supported by supreme court case law. Specifically, as cited in defendant's opening brief, in *People v. Lisle*, 390 Ill. 327, 328 (1945), the supreme court stated that a change in the sentencing law "could only apply to those classes of cases in which a new law had become effective prior to the date of the actual sentence." The fact that *Spears* went against this precedent does not render counsel's performance deficient for not arguing the change in law in the motion to reconsider sentence. See, *e.g. People v. Chatman*, 357 Ill. App. 3d 695, 700 (2005) ("We cannot conclude that counsel's failure to invoke a ruling that had not occurred was objectively unreasonable or resulted in prejudice to defendant."). Additionally, although defendant argues that counsel should have nonetheless apprised the court of the change in law and argued for a reduced sentence in conformance with the spirit of the changed law, nothing in the record suggests that the court would have done so. The circuit court specifically noted it was going to sentence defendant to more than 13 years' imprisonment, as a previous sentence that length had not deterred defendant from committing additional crimes. Additionally, with the change in the statute, as argued by defendant, he would still have been eligible for up to 14 years' imprisonment and the court only sentenced him to half a year more than that. Thus, counsel's performance in not requesting a reduced sentence based upon the spirit of the law would not be objectively unreasonable as it was unlikely to succeed under the circumstances of this case. Counsel chose a reasonable path of pointing out specific issues counsel believed the court either focused on too much or not enough.

¶ 14 Even if we assume counsel's performance was deficient, we find that defendant did not suffer prejudice due to counsel's failure to argue for a more lenient sentence based upon the changed law. First, contrary to the ruling in *Spears* (see *People v. McKee*, 2017 IL App (3d) 140881, ¶ 33 (noting "that we are not bound by the decisions of other districts of the appellate court")), defendant was not entitled to have the new statute applied to his sentence through his motion to reconsider. Our supreme court has stated that a change in the sentencing law "could only apply to those classes of cases in which a new law had become effective prior to the date of the actual sentence." *Lisle*, 390 Ill. at 328; see also *People v. Hunter*, 2017 IL 121306, ¶ 54 ("In *People v. Hansen*, 28 Ill. 2d 322, 340-41 (1963), we held that the defendant was not entitled to be resentenced under the new criminal code, which went into effect just 13 days after he was sentenced, because, under section 4, 'a punishment mitigated by a new law is applicable only to judgments after the new law takes effect.' ").

¶ 15 Additionally, section 4 of the Statute on Statutes (5 ILCS 70/4 (West 2020)), upon which the *Spears* court relied, states that "[i]f any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment *pronounced after the new law takes effect.*" (Emphasis added.) Here, judgment was pronounced on July 12, 2018, when the court entered the sentence. As argued by defendant, the change in the sentencing law did not become effective until July 1, 2021, three years after defendant's judgment was pronounced. The fact that defendant could ask the court to reconsider his sentence does not change the fact that the judgment had been pronounced.

¶ 16 Further, "[w]hen ruling on a motion to reconsider a sentence, the trial court should limit itself to determining whether the initial sentence was correct." *Vernon*, 285 Ill. App. 3d at 304. Therefore, unless a change in the sentencing law is retroactive, it should not affect a decision on

a motion to reconsider because it would have no bearing on whether the initial sentence was correct. Notably, in *People v. Harris*, 2018 IL App (3d) 170365, ¶ 20, with regard to a motion to reconsider sentence that was heard approximately 20 years after the defendant was sentenced, this court noted the above principle and then stated that the circuit court "could not conduct a new sentencing hearing with the full benefit of two decades worth of hindsight" but was instead "required to review [the original sentencing] decision based on the circumstances available" for consideration at the time of the original sentence. Based on the foregoing analysis, we conclude that the circuit court here would not have been able to conduct a new sentencing hearing pursuant to the change in law that took effect three years after defendant's sentence was pronounced but instead was required to review the sentence based on the law in effect at the time defendant was sentenced. Therefore, defendant suffered no prejudice by counsel's failure to argue for reconsideration based upon the changed law.

¶ 17 We also reject defendant's original argument that he was prejudiced by the failure to argue the change in law even though it did not retroactively apply to him. As noted above, there is nothing in the record to indicate that the court would have been inclined to reduce defendant's sentence unless it was required to do so. To the contrary, the court was clear that it believed a sentence harsher than one of defendant's previous sentences of 13 years was necessary in this matter. Furthermore, his sentence was only 1½ years longer than that previous sentence. Thus, defendant has not shown a reasonable probability that the outcome of his motion to reconsider sentence would have been different had counsel argued the change in law.

¶ 18 Because defendant failed to show deficient performance and prejudice his claim of ineffective assistance of counsel fails.

¶ 19 B. Extended-Term Sentencing

¶ 20 Defendant argues that the court improperly sentenced him to an extended term on the Class 3 felony because the extended term could only be imposed on the most serious class of offense, which was the Class 2 felony. Defendant acknowledges he forfeited this issue but argues it is reviewable as second-prong plain error. The State concedes second-prong plain error occurred. See *People v. Bell*, 196 Ill. 2d 343, 355 (2001) (providing that when a defendant's offenses are part of a related course of conduct "an extended-term sentence may be imposed only on those offenses within the most serious class"); *People v. Wilkins*, 343 Ill. App. 3d 147, 149 (2003) (providing that courts have regularly reviewed claims that an extended-term sentence was not authorized by law under the second prong of the plain error doctrine). Defendant requests, and the State agrees, that his sentence on the Class 3 felony be reduced to the maximum nonextended term of five years' imprisonment. See 730 ILCS 5/5-4.5-40(a) (West 2018) (nonextended sentencing range for a Class 3 felony is two to five years' imprisonment). Accordingly, we accept the State's concession, and we reduce defendant's Class 3 felony unlawful failure to register as a sex offender sentence to five years' imprisonment. See Ill. S. Ct. R. 615(b)(4).

¶ 21 III. CONCLUSION

¶ 22 The judgment of the circuit court of La Salle County is affirmed as modified.

¶ 23 Affirmed as modified.